Office - Supreme Court, U. S.
FILED
SEP-15 1943
CHARLES ELMORE CROPLEY
CLERK

(12)

# SUPREME COURT OF TENNESSEE

**OCTOBER TERM, 1943**

---

## No. 356

---

JILLO BYNUM, ET AL.,

*Petitioners,*

*vs.*

THE FIRESTONE TIRE & RUBBER COMPANY.

---

**PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF TENNESSEE AND THE SUPREME COURT OF TENNESSEE, AND BRIEF IN SUPPORT THEREOF.**

---

WILLIAM M. HALL,
*Memphis, Tennessee,*
*Counsel for Petitioners.*

MARY GUIDI,
*Memphis, Tennessee,*
*Of Counsel.*

## INDEX.


| | Page |
|---|---|
| Petition for writ of certiorari | 1 |
| Summary statement of the matter involved | 5 |
| Jurisdiction of this court | 16 |
| Specification of errors on the question presented | 18 |
| Reasons relied on for granting the writ | 20 |
| Brief in support of petition | 25 |
| Statement of the case | 26 |
| Summary of argument | 28 |
| Federal question | 29 |
| Was federal question properly raised | 29 |
| (a) In trial court, by pleadings | 29 |
| (b) In Court of Appeals, by assignments of errors | 30 |
| (c) In Supreme Court, by assignment of errors | 30 |
| Evidence not conflicting on question presented | 30 |
| Business of respondent considered herein | 31 |
| Business of respondent's store | 31 |
| (a) Wholesale and retail | 39 |
| (b) Interstate | 40 |
| (c) Features of respondent's store | 42 |
| Conclusion | 47 |
| Appendix | 49 |


### Table of Cases Cited.


| | |
|---|---|
| *Craft* v. *Fish*, 6 Lab. Cas. 61262 | 40 |
| *Currin* v. *Wallace*, 206 U. S. 1 | 41 |
| *Fleming* v. *Stillman*, 6 Lab. Cas. 61566 | 38,40 |
| *Hamlet Ice Co.* v. *Fleming*, 5 Lab. Cas. 61019 | 41 |
| *Hayne* v. *Committee*, 307 U. S. 496 | 31 |
| *Lewis* v. *Nailling*, 3 Lab. Cas. 60078 | 31,38,42 |
| *Medrich* v. *Lowenstein*, 232 U. S. 236 | 31 |
| *Muldowney* v. *Seaberg Elevator Co.*, 4 Lab. Cas. 60517 | 42 |
| *Nickey* v. *Miss.*, 292 U. S. 393 | 31 |
| *Norris* v. *Alabama*, 294 U. S. 587, 55 Sup. Ct. 579 | 31 |

Page

*Pittman* v. *Home Owners Loan Corp.*, 308 U. S. 21.... 16
*Stoll* v. *Gottlieb*, 305 U. S. 165..... 31
*Toledo, etc. r. Co.* v. *Slavin*, 236 U. S. 545..... 31
*U. S.* v. *American Trucking Ass'n.*, 310 U. S. 534.....
*U. S.* v. *Darby*, 213 U. S. 100..... 39,42
*Walling* v. *American Stores Company*, 6 Lab. Cas. 61449. 37,38
*Wood* v. *Central Sand & Gravel Co.*, 33 Fed. Supp. 40, 2 Lab. Cas. 18642.....19,21,31,38,43

STATUTES CITED.

Fair Labor Standards Act of 1938 (29 U. S. C. A. Sec. 201 et seq.).....2,17,21
Judicial Code, Sec. 237, amended Feb. 13, 1925, 43 Stat. 937, 28 U. S. C. A. 344..... 16,27

CONSTITUTION

Const. of Tenn., 1870, Art. VI, Sec. 1..... 18

ADMINISTRATIVE BULLETINS.

U. S. Dept. of Labor, Wage & Hour Div. 6 of Dec. 1938..... 19
U. S. Dept. of Labor, Wage & Hour Div. 6 of June, 1941..... 19

# SUPREME COURT OF THE UNITED STATES

## OCTOBER TERM, 1943

---

# No. 356

---

JILLO BYNUM, ET AL.,

*vs.* *Petitioners,*

THE FIRESTONE TIRE & RUBBER COMPANY.

---

**PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF TENNESSEE AND THE SUPREME COURT OF TENNESSEE, AND BRIEF IN SUPPORT THEREOF.**

---

## PETITION.

*To the Honorable Harlan F. Stone, Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:*

MAY IT PLEASE THE COURT:

This action presents to your Honors a federal question of importance and not heretofore determined by this Honorable Court, viz: The applicability and scope of the exemption contained in Section 213 (a) (2) of the Federal Statute,

The Fair Labor Standards Act of 1938 (29 U. S. C. A., Section 201, et seq.), which is as follows:

> "The provisions of section 206 and 207 shall not apply with respect to (2) any employee engaged in any *retail or service* establishment the greater part of whose selling or servicing is in intrastate commerce * * *"

An authoritative and elucidating decision by this Honorable Court interpreting and construing the above section of the said Act is of great importance to the business world and the legal profession.

Petitioners pray this Court to review on writ of certiorari a judgment of the Court of Appeals of Tennessee and the Supreme Court of Tennessee, in the case there entitled *Jillo Bynum, Robert Mullins and Lonnie Lewis* v. *The Firestone Tire & Rubber Company.*

A final judgment of the Supreme Court of Tennessee was rendered on May 15, 1943, when the petitioners' petition for a writ of certiorari from that court to the Tennessee Court of Appeals was denied (R. 222).

The petitioners, former employees of the respondent, working out of and for one of the respondent's Firestone Auto Supply & Service Stores, which are the sole outlets and channels for goods, wares and merchandise manufactured and processed by the respondent, outside the state of Tennessee and in the state of Tennessee, brought this action under the Federal Statute, The Fair Labor Standards Act of 1938, in the Chancery Court of Shelby County, Tennessee, to recover minimum wages, overtime compensation and other benefits provided by said Act (R. 1; 12).

The issues joined by the pleadings filed by the parties hereto were:

(1) Were petitioners, as employees of the respondent, working out of and for its particular Firestone Auto Supply

& Service Store, engaged in interstate activities within the contemplation of the said Act?

(2) Was the respondent's particular Firestone Auto Supply & Service Store, for and out of which the petitioners worked, a *retail or service* establishment the greater part of whose selling or servicing was in intrastate commerce entitling respondent to the exemption contained in Section 213 (a) (2) of the Act?

(3) Were petitioners, as employees of the respondent, working out of and for its particular Firestone Auto Supply and Service Store, engaged in a bona fide retailing capacity under Section 213 (a) (1) of said Act entitling respondent to exemption from the liability imposed by Sections 206 and 207 of the Act?

The Chancellor, trying the cause upon oral testimony and without the intervention of a jury, held, adjudged and decreed (1) that the petitioners' activities in changing and mounting tires in Memphis, Tennessee, upon the trucks of interstate carriers of commerce constituted engaging in commerce within the purview of the Act (R. 32), but that the particular Firestone Auto Supply & Service Store of the respondent involved in this cause was a retail establishment under Section 213 (a) (2) and that, therefore, Sections 206 and 207 of said Act did not apply to the petitioners (R. 34). The Chancellor dismissed petitioners' action (R. 35).

The Chancellor declined to make a specific determination of issue (3) set out above (R. 44).

From so much of the Chancellor's decree as adjudged that the petitioners were employees of a retail establishment under Section 213 (a) (2) of the Act, petitioners perfected a limited appeal to the Court of Appeals of Tennessee (R. 46).

From so much of the Chancellor's decree as adjudged that the petitioners' activities in changing and mounting tires in Memphis, Tennessee, upon the trucks of interstate carriers of commerce constituted engaging in commerce under the said Act and from so much of the decree as failed to adjudge that the petitioners were employees engaged in a bona fide local retailing capacity, respondent perfected a limited appeal to the Court of Appeals of Tennessee (R. 47).

The Court of Appeals of Tennessee, on January 22, 1943, rendered its opinion and judgment, affirming the holding and judgment of the Chancellor adjudging that the respondent's particular Firestone Auto Supply & Service Store involved in this case was a retail establishment under Section 213 (a) (2) of the Act (R. 196).

The issues presented to the Court of Appeals by the respondent's appeal were not considered by that court and were thus pretermitted (R. 195).

The opinion and decree of the Court of Appeals appear in the record (R. 191, 196), and are not yet published.

Petitioners within proper time filed their petition for writ of certiorari in the Supreme Court of Tennessee and assigned errors on the part of the Court of Appeals, raising the issue whether the respondent's particular Firestone Auto Supply & Service Store was a retail establishment contemplated by Section 213 (a) (2) of the Act (R. 196, 218 et seq).

Respondent filed its petition for a writ of certiorari in the Supreme Court, assigning error on the part of the Court of Appeals in failing to consider and in pretermitting the issues presented in that court by respondent's assignments of errors (R. 233).

The petitions for writs of certiorari by the petitioners and respondent were both denied by the Supreme Court of Tennessee, without opinions (R. 222), May 15, 1943.

The petitions for certiorari being denied by the Supreme Court, the record was not transmitted to that court and is now lodged in the Court of Appeals of Tennessee. The Clerk of the Supreme Court and the Clerk of the Court of Appeals for the Western Division of Tennessee is the same person, the Hon. J. E. Springbett (22 Tenn. App. Rep. 5, 175 Tenn. 6). However, petitioners pray for certiorari to both courts so a technicality could not successfully be interposed that might defeat justice.

**Summary Statement of the Matter Involved.**

The respondent, The Firestone Tire & Rubber Company, of Ohio, is engaged in that state in the manufacture of automotive and vehicular tires, tubes, accessories and equipment and in the manufacture of sundry and various other commodities and products. In addition, goods, wares and merchandise, such as radios, frigidaires, heaters, bicycles and various other commodities are manufactured by independent manufacturers at the specific orders and contracts with respondent and at the designs and requirements of the respondent (R. 6).

In Shelby County, Tennessee, respondent operates and maintains a subsidiary, The Firestone Tire & Rubber Company, of Tennessee. The said subsidiary is engaged in Tennessee solely in the manufacturing and processing of automotive and vehicular tires, tubes, accessories and equipment and in the manufacture and processing of various other commodities and products (R. 23).

Respondent ships its wares, goods and merchandise, manufactured and processed at its plant in Ohio, and in its plants in other states, and goods, wares and merchandise manufactured for it by independent manufacturers, in interstate commerce to its subsidiary plant in Shelby County, Tennessee (R. 7).

With the manufacturing of goods, wares and merchandise produced by the respondent at its plant in Ohio and at its subsidiary plant in Shelby County, Tennessee, in the sense of developing or producing finished commodities from raw materials the petitioners have no connection and this cause is in no way predicated upon such premises. The Firestone Tire & Rubber Company of Tennessee is not a party to this litigation, but only the parent organization, The Firestone Tire & Rubber Company of Ohio.

Respondent operates and maintains only one source for the disposal of its goods, wares and merchandise to the public, namely, certain outlets or channels known as the Firestone Auto Supply & Service Stores, which respondent owns and operates throughout the country (R. 23, 95).

In Memphis, Shelby County, Tennessee, on the corner of Washington & Third streets, in said city, county and State, respondent operates, maintains and owns one of its said Firestone Auto Supply & Service Stores. This is the particular Firestone Auto Supply & Service Store involved in this cause and this action is based upon a consideration of the business of this store and the work of the petitioners performed as employees of the respondent working out of and for this particular store. This action is grounded upon a consideration of the said store as a *unit* and not in connection with any other activities of the respondent. The activities of the petitioners are considered only with relation to the work which they performed solely as employees of the respondent working out of and for this particular store. Said store is not engaged in manufacturing or processing any merchandise, but engaged only in the *selling and servicing* of the goods and merchandise which is manufactured and processed by the respondent at its plant in Ohio, in respondent's other plants outside of Tennessee and at its subsidiary in Shelby County, Tennessee and the goods

manufactured outside of Tennessee by independent manufacturers for the Firestone interests (R. 7, 23, 95).

As heretofore stated the first issue formed by the pleadings herein was whether the petitioners, as employees of the respondent working out of and for its said store, were engaged in the production of goods for interstate commerce and in interstate commerce within the purview of the said Act.

Pleadings (R. 1, 12).

### Petitioners' Duties.

In performing the principal function of their duties the petitioners at the express order and direction of their superiors loaded truck, automobile, bus and tractor tires and tubes, other automotive accessories and parts, and other commodities, onto trucks at the said store for shipment, distribution and transportation into the States of Arkansas and Mississippi. That they, and each of them, delivered large quantities of truck and bus tires and tubes, etc. to the owners and operators of fleets of trucks and buses engaged in the interstate transportation of passengers and freight and that they, and each of them, mounted said tires and tubes onto the buses, trucks and trailers used in the transportation of interstate commerce. Petitioners, and each of them continually and regularly serviced the truck, trailer and bus tires so delivered and mounted by them on said vehicles. Petitioners were directed to, and did from time to time, deliver from the said store and from the plants owned and operated by the Firestone interests in Shelby County, Tennessee, and upon delivery mounted, large truck and tractor tires and tubes on automotive and vehicular machinery and tractors which automotive and vehicular machinery so equipped were offered for sale, sold, transferred and distributed in interstate commerce. Petitioners, and each of them, delivered orders of tires and tubes, auto-

mobile parts and accessories and other goods to dealers who resold the merchandise. Each of the petitioners at the order and direction of their superiors made deliveries of large quantities of truck tires and tubes from said store and, when so directed, directly from respondent's said subsidiary, to large commercial users thereof, a substantial portion of whom were engaged in interstate commerce and in the production of goods for interstate commerce. Truck and tractor tires and tubes so delivered were mounted by petitioners and were by them regularly serviced. Petitioners handled for retreading and recapping tires which were received in interstate commerce from outside the State of Tennessee, and those received from patrons of said store intrastate, by taking them from said store to the Firestone plant in Shelby County, Tennessee, or to independent retreaders, when the molds at the said Firestone plant were not large enough to accommodate said tires, and picking up from said plant or independent retreaders said tires after being processed or recapped, etc. and shipped same in interstate commerce to the out of state patrons, or mounted such tires on the buses, trucks, trailers, and vehicles of the patrons of said store in Tennessee (R. 48-58, 62, 63-64, 67-68, 69, 70, 71, 86).

Petitioners performed sundry other duties which it is not necessary to detail.

On this issue, regarding a consideration of whether the activities of the petitioners were within the purview of the Act defining *interstate commerce* and in the *production of goods for interstate commerce,* the Trial Court held and adjudged that the petitioners' (complainants') activities in changing and mounting tires in Memphis, Tennessee, upon the trucks of interstate carriers of commerce constituted engaging in commerce within the purview of the Act (R. 32).

The Trial Court passed on no other feature of the petitioners' duties.

The holding and judgment of the Trial Court that the petitioners were engaged in commerce within the purview of the Act was sustained by the Court of Appeals, when that court declined to consider this issue and pretermitted the question of whether petitioners were engaged in commerce within the Act, which question was raised in the court of Appeals of Tennessee by the assignments of errors filed in that court by the respondent (R. 195, 227).

The Supreme Court of Tennessee, in effect, adopted the holding and adjudication of the Trial court, and of the Court of Appeals, when it denied the respondent's petition for a writ of certiorari to review this issue, decided in favor of the petitioners, which issue was properly raised in the Supreme Court by the assignments of errors in the petition of respondent (R. 222, 234 et seq.).

The issue of whether the petitioners' activities brought them within the protection of the beneficient Fair Labor Standards Act of 1938, having been decided in their favor, it is not necessary to state further facts concerning the work of the petitioners.

The second issue in this action was raised by the affirmative defense plead by the respondent, to-wit: that its said store was a retail or service establishment the greater part of whose selling or servicing was in intrastate commerce, all within Section 213 (a) (2) of said Act (R. 5, 22).

The Chancellor held and adjudged that the respondent's said store was a retail establishment rendering service incidental to the conduct of the business of said establishment, the greater part of whose selling or servicing was in intrastate commerce within Section 213 (a) (2) of said Act and that, therefore, Sections 206 and 207 of the Act (29 U. S. C. A., Sections 206-207) were not applicable to the

petitioners. The Chancellor accordingly dismissed petitioners' suit (R. 35).

On January 22, 1943, the Court of Appeals of Tennessee, to which court petitioners had perfected a limited appeal on the issue of whether respondent's said store was such as contemplated by Section 213 (a) (2) of the Act, overruled the petitioners' assignments of errors filed in that court raising this issue and affirmed the judgment or decree of the Chancery Court holding that the respondent's said establishment was within the purview of section 213 (a) (2) of the Act (R. 196).

On May 15, 1943, the Supreme Court of Tennessee, in effect, adopted and approved the judgments and decrees of the Chancery Court and the Court of Appeals, when it denied the petition of the petitioners' for a writ of certiorari to review the judgment of the Court of Appeals holding respondent's said store was within the purview of Section 213 (a) (2) of the Act. Proper assignments of errors were filed in the Supreme Court of Tennessee raising the issue in that court (R. 222).

### Business of Said Store.

In support of its defense under Section 213 (a) (2) of the Act, respondent introduced in evidence and made a part of the record in this cause certain analyses made of the said store's business by the auditor of the respondent's Firestone Auto Supply & Service Stores. The auditor, Mr. John Ford Laumer, testified as a witness for the respondent and all of the analyses, designated as Exhibits were made a part of the record by the testimony of Mr. Laumer. The procedures employed by the auditor in compiling the Schedules, or Exhibits, will be set forth in the brief filed in this cause by the petitioners in support of the petition for writ of certiorari (R. 114 et seq.).

Exhibit #1 (Schedule "A") (R. 150, 114)

Exhibit #1 to the record shows the *wholesale and non-retail sales* and the retail sales of the said store, to-wit:

October 24, 1938–December 31, 1939

| Total Sales | Wholesale | Retail | % Wholesale | % Retail |
|---|---|---|---|---|
| $73,404 | $28,588 | $44,816 | 39.1 | 60.9 |
| | | For the Year 1939 | | |
| $369,306 | $129,234 | $240,072 | 34.0 | 66.0 |
| | | For the Year 1940 | | |
| $415,412 | $149,449 | $265,963 | 35.95 | 64.05 |

Exhibit #2 (Schedule "D")
(R. 151, 114).

| | 10/24/38 12/31/38 | 1/ 1/39 6/30/39 | 7/ 1/39 12/31/39 | 1/ 1/40 6/30/40 | 7/ 1/40 12/31/40 |
|---|---|---|---|---|---|
| Total Sales | $73,404 | $150,333 | $218,973 | $201,100 | $215,312 |
| Total Non-Retail Sales. | 14,770 | 23,718 | 54,333 | 48,662 | 43,265 |
| Retail Sales | 58,634 | 126,615 | 164,640 | 152,438 | 172,047 |
| % of Total Sales | 79.7 | 84.0 | 75.2 | 75.7 | 80.0 |
| % Non-Retail | 20.3 | 16.0 | 24.8 | 24.2 | 20.0 |

| | | Total Sales |
|---|---|---|
| Total for Entire Period | 859,122 | |
| Non-Retail | 184,748 | |
| Retail Sales | 674,374 | |
| % of Total Retail Sales | | 78.4 |
| % Total Non-Retail | | 21.6 |

Exhibit #5 (Schedule "G")
(R. 152, 114)

| | 10/24/38–9/20/40 |
|---|---|
| Total Sales per Operating Statement | $716,715 |
| Total Interstate Sales | 17,013 |
| Total Intrastate Sales | 699,702 |
| % Intrastate Sales | 97.8 |
| | 96.7 |

Exhibit #7 (R. 153, 115)

Respondent's witness-auditor testified that he picked at random two months' business of said store, July, 1939 and December, 1940, as indicative of the usual and average number of wholesale and retail transactions handled by it. July 1939 is within the period of controversy, December, 1940 is not.

For the month of July, 1939 the wholesale transactions handled by said store constituted 25.2% of the entire charge

transactions handled it, the cash sales not being considered. Each sales ticket represented a transaction and the sale may have been for one article or for a hundred (R. 107, 136).

*Features of the Business of Said Store.*

1. Respondent's said store solicited business and sold indiscriminately in wholesale and retail transactions (R. 60-62, 63, 65-66, 67, 79, 91, 94, 146, 50, 54, 56 and Exhibits 1, 2, 5 and 7.

(a) From Oct. 24, 1938 through December 31, 1938, said store earned *39.1%* of its total income from its wholesale business, from this source of business in the year 1939 said store derived *34%* of its total income and for the year 1940 said store obtained *35.95%* of its entire income from this type of business. The wholesale business of said store was a regular, usual and integral part of its entire unsegregated business, interstate and intrastate. See Exhibit #1, based on a quantity-price test and explained in the brief hereto (R. 150, 50, 51, 60, 62, 63, 68, 91 and 57, 70-72, 80-81, 94, 143).

(b) From Oct. 24, 1938 through December 31, 1938, said store obtained from strictly technical wholesale transactions, *i. e.* goods sold to dealers for resale, *20.3%* of its entire income; in the year 1939, said store from this type of business obtained *20.4%* of its entire income and for the year 1940, said store obtained *22.1%* of its entire income from this kind of business. Business to dealers was handled in interstate and intrastate transactions and as a regular and usual part of its business. See Exhibit #2 (R. 151) based on an analysis of sales for resale and sales made for consumption. (Explained in brief hereto.) (R. 60-62, 63, 65-66, 67, 79, 91, 94, 146.)

(c) Exhibit #7 to record, p. 153, shows that, on an average, *25.2%* of the number of transactions handled by said store are of a wholesale character, or one out of every

four deals is a wholesale sale. Each sales ticket represented a transaction and the sale may have been for one unit or a hundred (R. 136).

2. Said store, in its usual and regular business, and as a customary practice, handled goods demanded only by an industrial and commercial market, such as road builders' tires, tires for industrial machinery and equipment, farm combines, etc. (R. 51, 54, 56-57, 61-62, 63, 66-67, 69-70, 71, 77, 87).

3. Said store as a regular and customary part of its business sold gasoline in large quantities, at a discount from the retail price thereof, to dealers, for resale, and to large consumers thereof. The bulk and tank wagon sales were made by said store but delivered by an employee of another Firestone Auto & Supply Store (R. 101, 138, 187, 188). In addition to the bulk and tank wagon sales and deliveries of gasoline handled as above stated, said store, through its own employees, from the pumps on the premises of said store, sold gasoline in large quantities, and on contracts, filling the trucks of operators who owned and maintained fleets of trucks, by furnishing gas for such trucks daily or as needed, said gasoline being sold at a discount from the retail price and most of the gasoline so pumped from the premises of said store being consumed for the operation of vehicles engaged in interstate commerce (R. 138, 187, 188, 60-61, 78).

4. Merchandise sold by said store, such as tires and tubes, to large consumers of such articles were regularly serviced by its service system and "sales" of such service were made to the large utilizers of its service at a discount from the retail price of similar service performed for the individual (R. 135, 148).

5. For the sole purpose of soliciting, and selling to, dealers and in large quantities to large consumers of its

goods, said store maintained in its employ for such business, interstate and intrastate, three regular, and sometimes four, *commercial salesmen.* Said store furnished automobiles to such salesmen for their soliciting accommodation and work. Said salesmen did not work on the premises of said store, but solicited business and made sales away from the premises of said store, interstate and intrastate; other employees of said store made sales on the premises of said store (R. 61, 63, 68, 78, 91, 92.)

6. *Each* and *every article* handled and sold by said store carried a list of *three* prices, dealers', commercial and consumer's. Salesbooks containing all the articles handled and sold by said store and the three prices on each of said article were furnished by said store to its employees (R. 62, 75, 87, 91).

7. Said store maintained two types of billing, dealers and consumers. Sales in large quantities, at discounts, made to large consumers of its merchandise, were billed on the dealers statements (R. 61, 74, 76-77).

8. To meet competition by other manufacturers of similar products as manufactured by respondent's interests, and sold and serviced by its said store, said store made sales of its merchandise to large consumers and industrial, commercial and governmental accounts, at *even less than the dealers' prices* (R. 61, 63, 76, 91, 143).

9. A concerted and extensive scheme for selling its goods and to meet competition was mapped for said store by the respondent's Sales Manager of its Southern District. *All employees* of the said store, except the colored help, were required to solicit orders for, and to sell its goods. Each employee was assigned a monthly "quota" which he was required to meet, sell and fill. To spur on the sales activities of said store, each and every employee's progress in the

monthly sales endeavors and the amount of the current sales were posted *daily* on charts displayed at said store. The data on the charts showed the retail (goods sold to dealers to be retailed), commercial and consumer's business (R. 61, 63, 73, 75, 76, 78, 84-85, 86, 95.

10. All employees of said store, colored help excepted, were required to attend the sales meetings, district meetings, campaigns, conferences, etc., all supervised by the respondent's Sales Manager for its Southern District (R. 95).

11. Said store handled, as shown on Exhibits #1 and #2, merchandise termed by respondent "Sales Value of Deliveries". This represented the value of merchandise drawn from the stock of said store to fill the orders and contracts made by the respondent from its home office in Ohio with national organizations to meet the needs of said organizations vehicular requirements, and to fill orders from Firestone Auto Supply & Service Stores, outside of Tennessee, or their patrons; during the period from Oct. 24, 1938 through December 31, 1940, the total amount of these "Sales Value of Deliveries" amounted to $29,797. The sales were not made by the store, but as stated, by the respondent, and drawn from stock of said store and delivered or shipped by said store through its delivery system. The merchandise so drawn from the stock of said store was replaced in said store by respondent's District Office and said store was given a "commission" on these transactions in place of the "sales credit" which it received for sales made directly by it (R. 96, 121).

12. Said store regularly distributed and furnished a catalog containing a list of its commodities and articles and on which articles were given in said catalog the retail and wholesale prices (R. 62).

13. The stock of said store was one commingled mass, from which indiscriminately were drawn the orders for its intrastate, interstate, wholesale and retail business. The entire business of said store was operated under one roof, in one building, without physical separation of its various activities and types of business, and as one integral and combined unit. The work of its employees, except for the *commercial salesmen*, was indiscriminately and interchangeably utilized in its retail, wholesale, interstate and intrastate business (R. 50, 51, 60, 62, 63, 68, 91, 96).

14. Said store occupied a building which is one-fourth of a city block square in dimensions and it employed regularly about 30 employees, seven of whom were colored men, (R. 62). Of the seven colored men, only the petitioners drove trucks intrastate and performed business and work away from the said store, during the respective periods of their employment (R. 52, 54, 62, 63, 68, 92, 58).

PERIODS OF TIME FOR WHICH PETITIONERS EMPLOYED.

Petitioner Jillo Bynum was employed by respondent from October 24, 1938 to October 24, 1939, Lonnie Lewis from Oct. 23, 1938 to April 30, 1939, and Robert Mullins from June 26, 1939 to September 22, 1940 (R. 28, 29). Petitioners each worked 12 hours each weekday every week during their respective employment periods, with no time off for lunch, and worked 12 hours on every other Sunday (R. 32, 43-44, 49, 53, 55, 62, 65, 86). Petitioners were each paid $50 per month (R. 29).

## Jurisdiction of This Court

Jurisdiction of this court is based upon Sec. 237 of the Judicial Code, as amended by the Act of Feb. 13, 1925, 43 Stat. 937, 28 U. S. C. A. 344 (*Pittman* v. *Home Owners Loan Corp.*, 308 U. S. 21), authorizing petitions for writs of certiorari to be prayed for and issued to higher courts of vari-

ous states where "a title, right, privilege or immunity is set forth or claimed under a statute of the United States".

In this case, a title, privilege, right and immunity was set forth in the pleadings filed herein by the petitioners in the Chancery Court of Shelby County, Tennessee, seeking to recover benefits provided by The Fair Labor Standards Act of 1938, (29 U. S. C. A., Sec. 201 et seq.) (R. 1, 12).

The Chancery Court of Shelby County, Tennessee, failed to sustain and preserve the title, right, privilege and immunity claimed by the petitioners in this cause under the said Federal statute when it erroneously adjudged and decreed that the respondent's store involved herein was a *retail establishment* within the scope of Section 213 (a) (2) of said statute and dismissed petitioners' action (R. 34).

The Court of Appeals of Tennessee failed to sustain and preserve the right, title, privilege and immunity provided by said Federal statute for the benefit of the petitioners, when that court overruled the petitioners assignments of errors filed therein charging the Chancery Court had erred in adjudging the respondent's said store was a *retail establishment* under Section 213 (a) (2) and affirmed the Chancery Court (R. 195, 196).

The Supreme Court of Tennessee, failed to sustain and preserve the right, title, privilege and immunity claimed by petitioners under said Federal statute when that court on May 15, 1943, denied the petitioners' petition for a writ of certiorari to review the judgment or decree of the Court of Appeals' adjudging that the respondent's said store was a *retail establishment* under Section 213 (a) (2) of the Fair Labor Standards Act of 1938, and, in effect, overruled the petitioners' assignments of errors filed in that court charging error on part of the court of appeals in holding said store within the scope of a *retail establishment* as set out in Section 213 (a) (2) (R. 222, 218 et seq.).

The right, title, privilege and immunity claimed by the petitioners under the provisions of the Statute of the United States upon which this action is predicated, namely, The Fair Labor Standards Act of 1938, (29 U. S. C. A., Sec. 201 et seq.), is determinative of the issue herein. The errors of the Supreme Court of Tennessee, the Court of Appeals of Tennessee and the Chancery Court of Shelby County, Tennessee, are fundamental and their decisions in this cause rest on no non-Federal grounds but solely upon a construction or interpretation of Section 213 (a) (2) of said Statute, which matter is the sole and determinative issue involved.

The action of the Supreme Court of Tennessee in denying, on May 15, 1943, the petitioners' petition for a writ of certiorari is a final judgment or decree rendered by the highest court of the state of Tennessee in which a decision could be had. The Supreme Court of Tennessee is the "highest court of that state" as set forth in Art. VI, Sec. 1, of the Const. of Tennessee of 1870.

**Specification of Errors on the Question Presented.**

There is but one question presented in this cause for consideration by this Honorable Court, to-wit:

Is the *retail or service establishment* under Section 213 (a) (2) of 29 U. S. C. A., The Fair Labor Standards Act of 1938, limited and restricted to a firm or business engaged almost exclusively in making retail sales, or does the *retail establishment* under said Section cover with a mantle of protection a corporation or firm engaged in a combined, unsegregated, regular, usual and substantial retail *and wholesale* business, and doing a substantial business in interstate commerce?

Your petitioners submit that the Court of Appeals and the Supreme Court of Tennessee were each in error in the following respects:

1. The Court of Appeals and the Supreme Court of Tennessee erred in holding and adjudging that the respondent's store involved herein was a *retail establishment* under Section 213 (a) (2) of said Act because the *undisputed* evidence, introduced by respondent in its Exhibit #1 and made a part of the record in this cause, shows that from October 24, 1938 through December 31, 1938, the wholesale business of the said store amounted to *39.1%* of its entire income; in 1939 the said store derived *34%* of its total income from its wholesale business and in 1940 the wholesale business of said store amounted to *35.95%*, and that said store was substantially engaged in interstate commerce (Exhibit #5, R. 152).

2. The Court of Appeals and the Supreme Court of Tennessee erred in sustaining and affirming the Trial Court's decision that the respondent's said store was a *retail establishment* under Section 213 (a) (2) of said Act, because the record shows that the Trial Court and, therefore, the Court of Appeals and the Supreme Court of Tennessee, applied an erroneous interpretation to Section 213 (a) (2), refused or failed to follow the decision of the Court in *Wood* v. *Central Sand & Gravel* (2 L C. 18,642;), making a "substantial" participation in wholesale or non-retail business the test to be used in construing "retail establishment" under said section and elected to follow the 50% wholesale and 50% retail criterion set forth in Bulletin #6 (Retail and Service Establishments) of the Wage & Hour Division of the Department of Labor, published *December 1938,* which theory the Administrator of the Wage & Hour Division *repudiated,* after the decision in the *Woods* case, supra, and set up a *75%* retail and *25%* wholesale as the degrees of participation in the two types of business, in its Revised Bull. #6 of *June 1941* (R. 33, 37, 43).

3. The Court of Appeals and the Supreme Court of Tennessee erred in holding that the respondent's said store was a *retail establishment* under Section 213 (a) (2) of said Act as the *undisputed* evidence introduced by the respondent by its Exhibit #7 discloses that in July 1939, which month was picked at random by the respondent's auditor as indicative of the number of wholesale transactions handled by respondent's said store during the course of a month, disclosed that *25.2%* of the total number of transactions were wholesale in character, or one in every four sales made by said store was a wholesale sale (R. 160).

4. The Court of Appeals and the Supreme Court of Tennessee erred in holding that the respondent's said store was a retail establishment under Section 213 (a) (2) of said Act as the record shows that the said store was engaged in a combined wholesale and retail business, and doing part of its business in interstate commerce; that there was no physical separation in the types of business carried on by it, nor in the records maintained by it; that the stock of merchandise of the said store was a commingled mass from which was drawn the merchandise, indiscriminately, to fill the wholesale orders, the retail sales, the interstate transactions and the intrastate business; that the work of its employees was utilized indiscriminately by the said store and the petitioners handled interstate and intratstate business and wholesale and retail transactions of said store (R. 50, 51, 60, 62, 63, 68, 91, 96).

**Reasons Relied On for Granting the Writ.**

It is submitted that this Court should entertain jurisdiction of this cause for the following reasons:

(1) The issue here presented is a federal question of substance not heretofore determined by this Court, to-wit,

the interpretation of Section 213 (a) (2) of The Fair Labor Standards Act of 1938 (29 U. S. C. A., Sec. 201, et seq.).

(2) An authoritative and elucidating decision by this Court construing Section 213 (a) (2) of said Act is of great importance to the business world, to the legal profession and to the judiciary.

(3) The decisions of the Courts of Tennessee in this cause, applying the exemption contained in Section 213 (a) (2) to the respondent's store involved herein, were not predicated upon federal judicial decisions construing said section, and which had been announced at the time the judgments herein were rendered, and which decisions it was the duty of the state courts of Tennessee to follow, but based upon the theory advanced by a public official, the Administrator of the Wage & Hour Division of the U. S. Department of Labor, which theory was by the Administrator later *repudiated* as being erroneous and which official, the Administrator of the Wage & Hour Division, was not empowered by said Fair Labor Standards Act of 1938 (1) to restrict or extend the scope of Section 213 (a) (2) nor (2) to impose legally binding interpretations as to its meaning.

The Honorable Court in the case of *Wood* v. *Central Sand & Gravel*, 33 Fed. Supp. 40 (2 Lab. Cas. 18, 642) in considering the application of Section 213 (a) (2) of the Act to the defendants in that case, held:

> "Conceding that the defendant • • • makes many retail sales; yet, if it also does a *substantial wholesale* business, its business taken as a whole should not be considered a 'retail establishment' within the meaning of Section 13 (a) (2) of the Fair Labor Standards Act of 1938."

In the case at bar, the Courts of Tennessee refused to follow the ruling of Judge Martin, as set forth in the Wood case, supra; and, in sustaining the Trial Court, adopted the erroneous theory which had been advanced by the Administrator of the Wage & Hour Division of the U. S. Department of Labor, prior to the decision in the *Wood* case, supra.

The decision in the cause at bar which denied the right, privilege, and title claimed by the petitioners to recover benefits under the Fair Labor Standards Act of 1938, stems from the following opinion rendered by the Trial Court (R. 37):

> "Judge Martin, in the Wood *v.* Central Sand and Gravel case, says that a *substantial* part of the business of that company was *wholesale*, and therefore the Act applied. Well, the Administrator, up to July 1941, says that *fifty percent* is the determinative point, and that Wood *v.* Sand & Gravel case was decided while that idea was being promulgated by the Administrator. And then the Administrator changes it and makes it 75 and 25 percent.
>
> So, try as you may, you cannot follow all of these rulings of the Administrator. So, as I say, I think that while this store * * * has done—intentionally and pointedly—has done some business with dealers, and that they have made some large sales to truck lines and so on, that considering the set-up, as an entity, and the fact that the *percentage* as it stands in the record here *complies with the rulings of the Administrator made in the respective bulletins, then I think that in fairness that they should be said to be a retail establishment.*"

The Court of Appeals of Tennessee and the Supreme Court of Tennessee, ignored and rejected the construction and interpretation of Section 213 (a) (2) of this Act of

Congress, the Fair Labor Standards Act of 1938, announced and established by the federal court in the *Wood* v. *Central Sand & Gravel* case, and which construction has been followed consistently by other courts, and committed material error by adopting the erroneous theory of a mere official, who *repudiated* the very basis upon which this right, privilege and title of the petitioners was decided by the courts of Tennessee. The petitioners' right, privilege, title and immunity claimed under the salutary Fair Labor Standards Act of 1938, was not preserved, sustained and considered by the Court of Appeals and the Supreme Court of Tennessee in harmony with and in accordance with the law in this cause. It is, respectfully submitted that this cause should be reviewed by this Court.

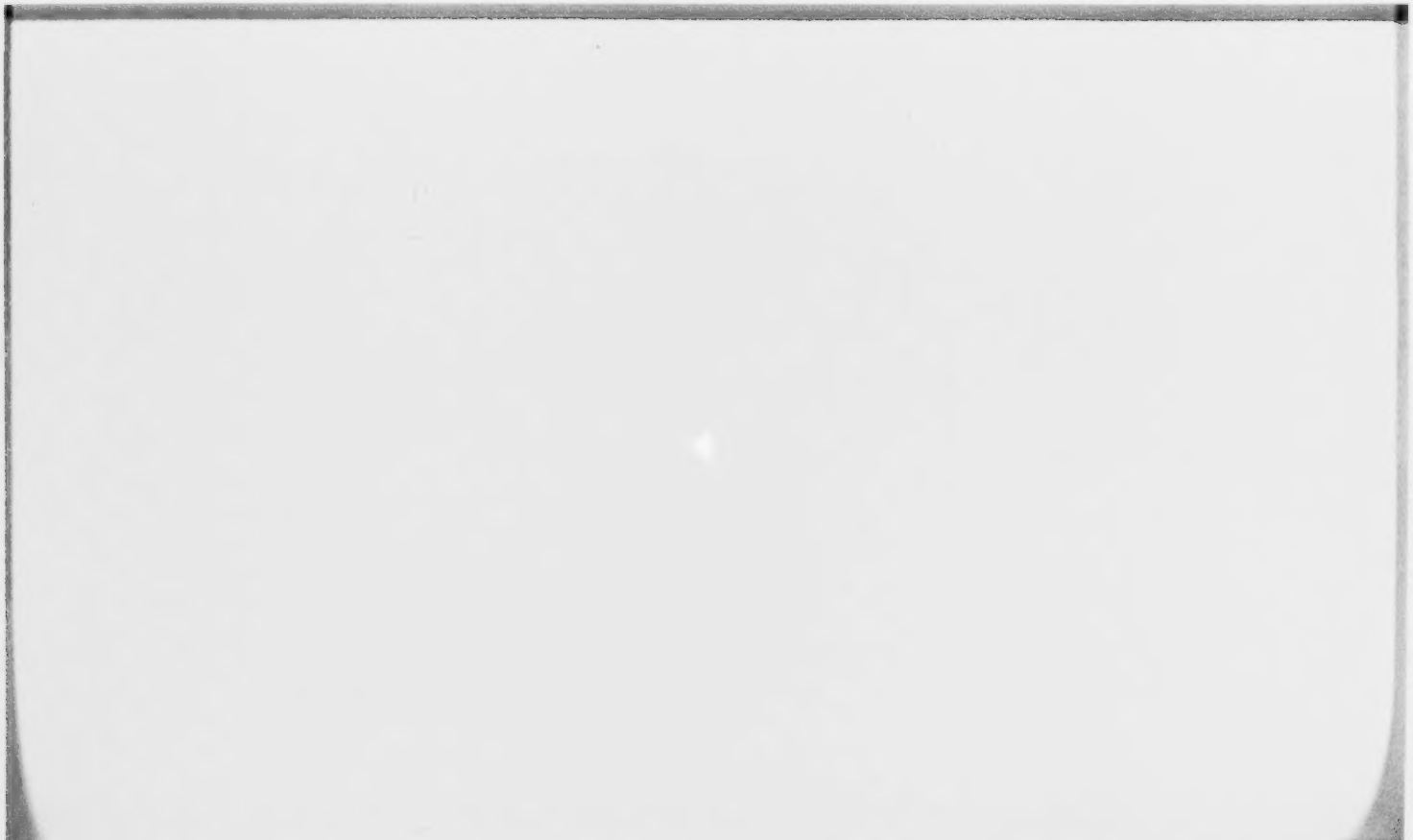
Your petitioners present herewith as a part of this petition a certified copy of the transcript of the record in the Court of Appeals and the Supreme Court of Tennessee and present their brief for consideration with the petition discussing the question involved.

Wherefore, your petitioners pray that a writ of certiorari may be issued out of and under the seal of this Court directly to the Court of Appeals and the Supreme Court of Tennessee, commanding said courts to certify and send to this Court on a day certain to be therein designated a full and complete transcript of the cause in said courts styled, *Jillo Bynum, Robert Mullins and Lonnie Lewis* v. *The Firestone Tire & Rubber Company, Shelby Equity,* to the end that said cause may be reviewed and determined by this Court and that the petitioners may have such relief as this Court may deem proper and equitable and that the opinion and judgments or decrees of the Court of Appeals and Supreme Court of Tennessee, sustaining and affirming the Chancery Court of Shelby County, Tennessee, may be

reversed and judgment entered in this cause in favor of the petitioners for all equitities to which they may be entitled.

JILLO BYNUM,
ROBERT MULLINS,
LONNIE LEWIS,
By WILLIAM M. HALL,
*Memphis, Tennessee,*
*Attorney for Petitioners.*

MARY GUIDI,
*Memphis, Tennessee,*
*Of Counsel.*



SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1943**

---

# No. 356

---

JILLO BYNUM, ET AL.,

*Petitioners,*

*vs.*

THE FIRESTONE TIRE & RUBBER COMPANY.

---

## BRIEF IN SUPPORT OF PETITION.

---

This brief, in support of the petition for a writ of certiorari, seeks to reverse the judgment of the Court of Appeals, and Supreme Court of Tennessee, which held and decreed that the respondent's Firestone Auto Supply & Service Store herein involved was, as held and adjudged by the Chancellor of the Chancery Court of Shelby County, Tennessee, a *retail establishment* within Section 13 (a) (2) of the Fair Labor Standards Act of 1938 (29 U. S. C. A., Sec. 213 (a) (2)), although the undisputed evidence as presented by respondent's Exhibit #1, made a part of the record in this cause, shows that from October 24, 1938 through December 31, 1938, said store derived *39.1%* of its total income from wholesale business handled and transacted by it; for the year 1939 said store derived *34%* of its total income from wholesale business and in 1940 said store enjoyed an

income of *35.95%* of its total revenue from its wholesale business, and that in the usual, regular course of its business said store was engaged in making interstate sales and deliveries of goods, wares and merchandise which amounted to a substantial degree, as shown by respondent's evidence which was made a part of the record in this cause, Exhibit #5 (R. 150, 152).

The Tennessee Courts based their action upon the erroneous theory which had been promulgated by the Administrator of the Wage & Hour Division of the U. S. Dept. of Labor, as set out in its Bull. #6 (Retail and Service Establishments) of *December 1938*, and which theory the Administrator *repudiated* after the Decision in the case of *Wood* v. *Central Sand & Gravel*, (33 Fed. Supp. 40), and refused to follow the Federal courts' construction of Section 213 (a) (2) of the Statute herein involved; and, the plain language of said section refers solely to *retail or service* establishments and in nowise refers to nor mentions a *wholesale* or a combined *wholesale* and retail establishment.

**Opinions of the Courts Not Reported.**

The Opinions of the Courts of Tennessee in this cause have not, at this date, been officially reported. The Opinions of the Court of Appeals of Tennessee and that of the Chancery Court of Shelby County, Tennessee, were made a part of the certified transcript in this case and are found on pages 35 and 191 of the transcript. The Supreme Court of Tennessee rendered no opinion when it denied the petitioners petition for a writ of certiorari on May 15, 1943.

**Statement of the Case.**

Action was brought by petitioners, former employees of respondent, working out of and for one of its Firestone Auto Supply & Service Stores, which are the sole outlets for the disposal of the manufactured commodities of re-

spondent, to recover benefits under the Fair Labor Standards Act of 1938 (29 U. S. C. A., Sec. 201 et seq.), alleging that because of their activities performed as employees aforesaid they were under the protection of said Act and entitled to the remedies provided therein. Denial of the propositions advanced by petitioners was made by respondent and it affirmatively plead Section 213 (a) (2) of said Act which exempts from the provisions of Sections 206-207 the employees of a business which is a retail or service establishment, the greater part of whose selling or servicing is in intrastate commerce.

The Courts of Tennessee held that the petitioners were engaged in interstate activities under said Act; the Trial Court specifically so holding, the Court of Appeals pretermitting this issue, made by the respondent's assignments of errors in that Court and the Supreme Court in denying the respondent's petition for certiorari, in which Court respondent had filed its assignments of errors raising said issue.

The Courts of Tennessee held that the respondent's store herein involved was a *retail establishment* under Section 213 (a) (2) of said Federal Statute (R. 34, 195).

The Supreme Court of Tennessee, which is the highest court in the State of Tennessee in which a decision could be had rendered a final judgment in this cause when it denied petitioners' petition for writ of certiorari on May 15, 1943 (R. 222).

A more detailed statement is made in the petition for writ of certiorari, *supra,* page —— and reference is made thereto, in the interest of brevity and to avoid repetition.

**Jurisdiction of This Court.**

Jurisdiction of this Court is based on Sec. 237 of the Judicial Code, as amended by the Act of Feb. 13, 1925, Ch. 299, Sec. I, 43 Stat. 937, and by Act of Jan. 31, 1928, Ch. 14,

Sec. I, 45 Stat. 54, 28 U. S. C. A. 344; (*Pittman* v. *Home Owners Loan Corp.* 308 U. S. 21), authorizing petitions for writs of certiorari to be prayed for and issued to higher courts of various states where "a title, right, privilege, or immunity is set forth and claimed under a statute of the United States."

**Assignment of Error.**

The Court of Appeals and the Supreme Court of Tennessee erred in holding and adjudging that the respondent's Firestone Auto Supply & Service Store involved in this cause was a *retail establishment* under Section 213 (a) (2) of the Federal Statute, an Act of Congress, the Fair Labor Standards Act of 1938, (29 U. S. C. A., Section 213 (a) (2)), as the *undisputed evidence introduced by respondent* as shown in its Exhibit #1, which Exhibit was made a part of the record in this cause, disclosed that the said store from October 24, 1938 through December 31, 1938, obtained *39.1%* of its total income from its *wholesale* business, in 1939 said store obtained *34%* of its total income from its *wholesale* business and for the year 1940 said store obtained *35.95%* of its total income from its *wholesale* business and that a substantial part of the business of said store was in interstate commerce (exhibit #5); and, that respondent's undisputed evidence shows that in July 1939, which month was picked at random as indicating the usual, regular and average number of wholesale transactions and retail transactions handled by said store, *25.2%* of the total number of transactions handled by said store were of a wholesale character. (Exhibit #7) (R. 150, 152, 153).

**Summary of Argument.**

This action involves the interpretation and application of Section 213 (a) (2) of the Federal Statute, the Fair Labor

Standards Act of 1938 (U. S. C. A., Sections 201 et seq. — 213 (a) (2)), which is as follows:

> "Sec. 213 (a) The provisions of sections 206 and 207 shall not apply with respect to (2) any employee engaged in any retail or service establishment the greater part of whose selling or servicing is in intrastate commerce, * * *"

## Was Federal Question Properly Raised?

This action is predicated solely upon the right, privilege and title provided by the Federal Statute, The Fair Labor Standards Act of 1938 (29 U. S. C. A., Sec. 201 et seq.) to employees engaged in interstate commerce and in the production of goods for interstate commerce whose employers failed to compensate them under Sections 206-207 of said Statute.

### *In the Trial Court.*

The petitioners filed this action alleging that they were engaged in interstate activities within the meaning of said Statute and that they were due minimum wages, overtime compensation and other benefits for work performed for respondent. To the action of the petitioners respondent filed its denial and affirmatively plead for defense provided by Section 213 (a) (2) of said Act (R. 1, 12, 5, 22).

The federal question here presented: Whether respondent's store involved herein was a *retail establishment* under Section 213 (a) (2) was properly raised by the pleadings filed in the Chancery Court of Shelby County, Tennessee, by the petitioners and the respondent. The Chancellor adjudged that the respondent's said store was a retail establishment under Sec. 213 (a) (2) of said Act, though the evidence introduced by respondent proved that said store was engaged in a substantial, combined retail *and whole-*

*sale* establishment, a part of which business was in interstate commerce (R. 34, 150, 152).

*In the Court of Appeals.*

This federal question here presented and with which petitioners are concerned was preserved and raised by petitioners' assignments of errors filed in that Court (R. 189 et seq.). The Court of Appeals in passing upon the issue of whether respondent's said store was a retail establishment under Section 213 (a) (2) of said Act, held that this issue was determinative of the lawsuit and adjudged and decreed said store a retail establishment under said Section 213 (a) (2) (R. 195).

*In the Supreme Court of Tennessee.*

Petitioners preserved the federal question here presented, whether respondent's said store was a *retail* establishment under Section 213 (a) (2), by their assignments of errors made in that Court (R. 218 et seq.). The Supreme Court of Tennessee, in which petitioners had filed petition for writ of certiorari, along with their assignments of errors, on May 15, 1943, denied the petition (R. 222).

EVIDENCE IS NOT CONFLICTING.

This federal question, the scope of Section 213 (a) (2) of the Fair Labor Standards Act of 1938, and whether same is applicable to the respondent in the conduct and operation of its Firestone Auto Supply & Service Store involved in this cause, is presented to this Court on the *undisputed* evidence as introduced by and made a part of the record in this cause by the respondent.

This Court, *the Supreme Court of the United States, can and will perform its proper functions and protect the fed-*

*eral rights of the petitioners under the Fair Labor Standards Act of 1938.*

*Norris* v. *Alabama,* 294 U. S. 587, 55 S. Ct. 579;
*Medrich* v. *Lowenstein,* 232 U. S. 236;
*Toledo, etc., R. Co.* v. *Slavin,* 236 U. S. 545;
*Stoll* v. *Gottlieb,* 305 U. S. 165;
*Nickey* v. *Miss.,* 292 U. S. 393;
*Hayne* v. *Committee,* 307 U. S. 496.

*Retail and Wholesale Business of Respondent's Store.*

The exemption provided by Section 213 (a) (2) of the Fair Labor Standards Act of 1938, does not by its terms extend to a *wholesale establishment* nor to a retail *and wholesale establishment* combination. The exemption is restricted in terms to a *retail establishment* alone.

In the case of *Wood* v. *Central Sand & Gravel,* 33 Fed. Supp. 40, the Court held that a company selling its goods in large orders or quantities, and at a discount from the regular retail price, and engaging in this type of business to a substantial degree, could not be considered a *retail establishment* under Section 213 (a) (2) aforesaid. It is to be recalled that in the *Wood* case, the goods were sold in large quantities, at a discount and not for resale but sold for consumption by the various purchasers. The fact that the goods were to be consumed was of no consideration in the determination of the character of the transaction. The Court held that if a company engaged in a *substantial* wholesale business, the exemption of Section 213 (a) (2) could not be successfully invoked by it.

The courts of Tennessee, in the case at bar, refused to follow the interpretation of Section 213 (a) (2) as determined by the federal court in the *Wood* case, *supra,* and as established and further announced in the case of *Lewis* v. *Nailling,* 3 Labor Cases 60078.

The Tennessee courts undertook to, and did base their decision in this cause, upon a certain ruling of the Administrator of the Wage & Hour Division made in connection with that officer's Bull. #6 (Retail & Service Establishments) issued *December 1938*, by which the Administrator ruled that a *50%* engagement in *wholesale* activities and *50%* in *retail* business would bring a company or person within the provision of Section 213 (a) (2). Following the ruling in the *Wood* v. *Central Sand & Gravel* case, *supra*, which adopted the *substantial* test in determining the application of Section 213 (a) (2), the Administrator *repudiated* its 50-50% theory, and adopted a *75% retail* and *25% wholesale* as being the test of the applicability of said section. (Bull. #6—Retail & Service Establishments, Revised, of *June, 1941*) (R. 160).

At the time that this cause was tried before the lower court, in *January 1942*, the decisions in the *Wood* case, *supra*, and in *Lewis* v. *Nailling, supra*, had been announced and published, and the Administrator had repudiated its 50-50% theory, and had announced its *75%-25%* theory and issued its Revised Bull. #6 of *June 1941*.

Yet, while the evidence, *undisputed* and *introduced and made a part of the record in this cause by the respondent, established and proved*, that the respondent's store herein involved *was not* entitled to the application and exemption of Section 213 (a) (2) under the decisions in the *Wood* case and even under the *75% retail* and *25% wholesale* theory advanced by the Administrator of the Wage & Hour Division in June 1941, the Courts of Tennessee, deny to these petitioners the right to recover benefits under this salutary Fair Labor Standards Act by applying to the respondent's said store the exemption, as determined *and repudiated* by the Administrator, of a 50-50% engagement in the two types of business.

Thus we have the Courts of Tennessee adopting an erroneous ruling, made by the Administrator and which the Administrator *repudiated* before the trial of this action.

The Administrator is not empowered by the Act to extend or restrict the application of Section 213 (a) (2), nor to make a legally binding interpretation of said Section. The administrator so states in the second paragraph of his Bull. #6 of June 1941 and the Courts have so held. *Walling* v. *American Stores*, 6 Labor Cases, 61449. The Tennessee Court, in this cause, refused to follow the authoritative and judicial interpretation given to said section by the federal courts.

Exhibit #1 (R. 150).

Respondent's witness-auditor testified that in making up Exhibit #1 (Schedule "A"), he placed in the category of "Commercial, Industrial, Governmental and Farm-Non-Retail Sales" those sales which during a *six* months period (6-months periods being suggested by the Administrator in its Bull. #6 of June 1941, Revised, and found in 2 Commerce Clearing House, Par. 32, 106, page 32,225 and which was made Exhibit #9 to the record by the respondent) added to seven passenger tires or ten truck tires, *sold at less than the going or retail price* (R. 100-101, 114, 120). Sales made to dealers for resale were shown as "Sales to Dealers" (R. 104).

Included in "Commercial, Industrial, Governmental and Farm-Non-Retail Sales", on this Exhibit, were *tank wagon sales* of gasoline which during a 6-months period amounted to 1500 gallons or over, *sold at less than the retail price* (R. 101). (These Tank wagon sales of gasoline were sold by the respondent's said store but delivered by an employee of another Firestone Auto Supply & Service Store) (R. 138, 187, 188). All the gasoline sold in tank wagon lots, at less than the retail price, and gasoline sold from the pumps on the premises of the said store, at less than the retail price,

in bulk and on charge accounts by filling up daily, or as needed, the trucks of its customers, and sold at a discount from the retail price, which did not amount to 1500 gallons during a six-months period, but which might amount to 1499 gallons or less, were not included in the category of "Commercial, Industrial, Governmental and Farm Non-Retail Sales", but were thrown into the general consumers sales (R. 138, 187, 188, 60-61, 78).

Another classification shown on Exhibit #1 is "Sales Value of Accommodation Deliveries". These sales were on contracts with National Organizations, made directly by the respondent, in Ohio, but shipped interstate to the customers by the respondent's said store out of said store's stock, and, included in this category were shipments of goods made by the said store to patrons of other Firestone Auto Supply & Service stores located outside of Tennessee. The merchandise so drawn from the stock of the said store was replaced in said store by the District Office of the respondent. For handling these "Accommodation Deliveries", the said store received a "commission", in place of the "sales credit" which it obtained when it directly made a sale (R. 96, 121).

With reference to the above-described Exhibit #1, the Chancellor held that from Oct. 24, 1938 and up to and including September 22, 1940, (the last date involved in this lawsuit,) and further up to December 31, 1940, from 60.9% to 71.3% of the total sales made by the defendant establishment, * * * were retail sales within the purview of the rulings of the Administrator of the Wage & Hour Division * * * as reflected by Exhibits 8 and 9, and, that therefore, more than *51%* of the sales of said store were retail sales within the rulings and Interpretative Bulletin of the Wage & Hour Division (R. 37, 43, 33).

The Exhibit #9 referred to was Bull. #6 of June 1941, wherein the Administrator set up its 75% retail and 25%

wholesale as the test of applying Section 213 (a) (2). Exhibit #8 was a letter from the Administrator to respondent wherein certain questions regarding sales which were described so as to come under the definition of "retail" transactions were answered by the Administrator. Said letter, Exhibit #8 will be found in the transcript, page 156.

It is to be noted that while the respondent testified that it compiled its Exhibits by the rules set out in the Bull. #6 of June 1941, that the Court ignores the percentages as set up therein by the Administrator and adopts the percentages as had been set up by the Administrator in its former Bull. #6 of Dec. *1938*, except for the first 6-months period of 1939 shown on Exhibit #1 (R. 33, 34, 160 et seq.).

In presenting this cause, petitioners accept without dispute the data shown on this Exhibit #1, though this analysis does not, in a consideration of the meaning of "retail" and, "wholesale", as construed by judicial interpretation, include a complete and full record of the business conducted by respondent's said store in the two types of transactions.

As undisputed evidence, therefore, respondent's Exhibit #1 shows that its said store earned from Oct. 24, 1938 through December 31, 1938, *39.1%* of its receipts from *wholesale* business, in the year 1939, it earned from this source of business *34%* of its total income and in the year 1940, it derived *35.95%* of its total income from *wholesale* business (R. 150).

Exhibit #2 (Schedule "D") (R. 151, 114).

Respondent's witness-auditor testified that in preparing Exhibit #2 he placed sales made to dealers in that classification and all other sales, regardless of volume, price or anything else, in the classification of retail sales; that the only distinction which he observed was in goods which

were sold for resale and that sold for consumption. (R. 151, 105).

In this Exhibit #2 all those sales in large quantities, at a discount from the retail price, made of tires and other merchandise, running up into the thousands of dollars, were shown as retail sales because the business, industrial and governmental organizations purchasing them used them in their various activities (R. 105, 136-137).

Likewise, all sales of gasoline, even including those of 1500 gallons per 6-months periods, and sold at a discount from the retail price were considered as retail sales on this Exhibit #2 except for the dealer, Walter Hunter. And sales of gasoline, sold at a discount from the retail price constituted the manner in which the larger portion of this product was sold (R. 138, 187, 188).

In a comparison of this Exhibit #2 with Exhibit #1, considering the "Commercial, Industrial and Farm Non-Retail Sales," the income from merchandise sold for consumption to commercial, industrial and such organizations, in large volume and at a discount from the retail price, constituted a substantial portion of the said store's business. (R. 150, 151).

In this connection it is to be recalled that in the case of *Wood* v. *Central Sand & Gravel*, 33 Fed. Supp. 40, *supra*, that the City of Memphis, the W. P. A., the contractors, etc., were not sold materials by the defendants in that case, for resale, but for consumption in their activities.

Even considering this Exhibit #2 and the data thereon shown of *sales made for resale*, or *non-retail sales*, said store from this source from Oct. 24, 1938 through December 31, 1938, earned *20.3%* of its total income, for the year 1939, *20.4%* of its total income was from this type of business and in the year 1940 said store earned 22.1% of its income from sales made to dealers for resale, which percentages are all substantial under the holding of the Court

in the *Wood* case *supra*. The percentages just mentioned show that over one-fifth of the income of the said store was from sales made for resale, which are strictly and technically *wholesale* transactions. In the *Wood* case, further, there were no strictly technical *wholesale* sales but sales made by the defendants were in large quantities and at a discount from the retail price to the large consumers of its materials. The income derived from sales to dealers, without consideration even of the *wholesale* sales made for consumption, is substantial to the extent that Section 213 (a) (2) cannot be successfully invoked by the respondent in this case.

Had respondent's said store been dealing in the wholesale business alone which it transacted and which was substantial, and doing part of its business in interstate commerce, as shown on Exhibit #5 to the record, its employees would have been under the protection of the Act and the exemption in Section 213 (a) (2) would not have been of the least consideration in relation to its business.

Following in analogy the thought of the *U. S. Circuit Court of Appeals, Third Circuit, in Walling* v. *American Stores Company, 6 Labor Cases, 61449:* Is the respondent in this cause exempt from the obligations imposed by the Fair Labor Standards Act in Sections 206-207 thereof, because in connection with, and as an unsegregated part of, the business carried on by its said store it is engaged not only in a substantial retail capacity but substantially engaged in the business of a wholesaler, whereas, if it conducted only its wholesale business it would be required to pay its employees under the requirements of said Act?

It is interesting to note that after the Fair Labor Standards Act was enacted many attempts to grant total exemptions to employers engaged in wholesale businesses were made. They all failed. See note to *Walling* v. *American Stores Co.*, 6 Lab. Cas. 61449. Congress intended that only

a retail establishment, and not a retail *and wholesale* establishment, indiscriminately carrying on its business in the two types of sales, should be exempt under Section 213 (a) (2), and the employees of such employers not be denied their proper rights to pay under the Act.

Lest there be any confusion in looking to the stores of the American Stores Co., in *Walling* v. *that defendant,* in 6 Lab. Cases 61449, *and the store here in question, the units* in the *American Stores* case all sold strictly at one price to all, at strictly retail, and made no sales in large quantities and at discounts and they were not in anywise engaged in making sales in interstate commerce. This was not the case, as shown by the record, of the store in this action.

The case at bar is on all fours with the case of *Fleming* v. *Stillman,* 6 Labor Cases, 61566, U. S. District Court of Tennessee.

Both Exhibits #1, based on the quantity-price test set up by the Administrator of the Wage & Hour Division, and Exhibit #2, based upon the distinction of sales made for resale and sales made for consumption, establish that respondent's said store was substantially engaged in *wholesaling,* conducting a combined and unsegregated retail *and wholesale* business, and that a substantial part of its business was in interstate commerce; that apart from its *wholesaling* activities in making sales in large quantities and at discounts to organizations consuming its products in their various activities, said store derived from its sales made to dealers for resale a substantial part of its regular business.

In *Wood* v. *Central Sand & Gravel,* 33 Fed. Supp. 40 and in *Lewis* v. *Nailling,* 3 Lab. Cas. 60078, the test was whether a *substantial* part of the defendants' business was wholesale. In the *Wood* case, the substantial part in percentage is not shown; in the *Lewis* case it was 40%, which

40% is less than the 50% theory which had been advanced by the Administrator in 1938.

In the cause before the Court now, the respondent in and through its activities in the selling and servicing which it handled through its said store, certainly, under the decision of the Court in the foregoing cases, was substantially engaged in *wholesaling*. The Court of Appeals of Tennessee and the Supreme Court of Tennessee were in error in holding that Section 213 (a) (2) of this salutary and humane Federal Statute was applicable to the respondent's store herein.

*Said Store Not Engaged in Manufacturing.*

Respondent, and the Tennessee Courts, from the expression in the Opinions, make much ado about the fact that said store was not engaged in manufacturing. Manufacturing is not commerce. The shipping, transmitting, selling of goods in interstate commerce is commerce. (*U. S. v. Darby,* 213 U. S. 100). This action is not predicated upon any premises that the unit store herein was engaged in the manufacturing or production of goods, but based upon the fact that said store was engaged in selling, and at wholesale and retail, in interstate commerce and intrastate commerce.

Congress intended that merchants who were engaged in selling and servicing, were not to be exempt from the obligations of the Act if they were to a substantial degree engaged in selling in wholesale transactions and in interstate commerce. And, Congress, then apart from the Sections applying to those engaged in manufacturing, by Section 213 (a) (2) sought to bring into the purview of the duties imposed by this Act those whose goods would burden interstate commerce, because they sell and transport in the channels of interstate commerce.

There is nothing to the contention of the respondent nor to the expression of the Courts on this phase of the matter.

*Interstate Activities of Said Store.*

The position of the petitioners is that the application of Section 213 (a) (2) of the Fair Labor Standards Act is limited to retailers and that wholesalers do not come within this exemption *under any circumstances. Craft* v. *Fish*, 6 Lab. Cas. 61262; *Fleming* v. *Stillman*, 6 Lab. Cas. 61566.

If the exemption provided by said section is not applicable to said store, as failing to meet the requirements of a "retail" establishment thereunder, then if *any substantial* part of the business conducted by said store be in interstate commerce, sections 206-207 are applicable to petitioners and other employees of said store. *Craft* v. *Fish, supra.*

Respondent's Exhibit #5 (R. 152) shows that it directly sold during the period involved herein $17,013 of its goods in interstate commerce, or *2.2%*. It is to be noted that in compiling Exhibits #1 and #2, data is shown thereon up to and including December 31, 1940, whereas in this Exhibit #5, the interstate business done by said store is shown only through September 20, 1940, said date being the last day involved actually in this case. What was the amount of interstate business done by this store from Sept. 20, 1940 through Dec. 31, 1940? This is not shown.

Further, on this Ex. #5, the percentage of interstate business handled by said store in transmitting the "Sales Value of Deliveries", which amounted to $29,797 (exhibits #1 and #2) is not shown in full. The auditor-witness testified (R. 111, 112, 117), that he separated the "Sales Value of Accommodation" etc., into the intrastate transactions and interstate transactions, which resulted in an interstate business amounting to *3.3%*, as shown on the Exhibit #5.

However, these transactions were all interstate in character as they represent the value of goods shipped by the said store on orders which all emanated from outside the State of Tennessee, being either the orders on "National" accounts, contracts made by respondent with national organizations at its home office in Ohio, or orders from some other Firestone Auto Supply & Service Store outside of Tennessee and all of which goods came out of the commingled mass of merchandise of the said store (R. 50, 51, 60, 62, 63, 68, 91, 96, 112, 117, Ex. p. 152).

*Sec. 2 of the Fair Labor Standards Act;*
*Currin* v. *Wallace,* 206 U. S. 1;
*Hamlet Ice Co.,* v. *Fleming,* 5 Lab. Cas. 61019.

If the "Sales Value of Accommodation Deliveries", totaling $29,797 be fully considered, as they were, interstate transactions, then there was 4.4% of the said stores' business in interstate commerce from this source, which together with the 2.2% admitted by the respondent to represent sales made by it directly in interstate commerce, amounts to an interstate participation of *6.6%*. And, this degree of participation in interstate commerce by said store, without consideration to the sales of merchandise and gasoline made by said store in the city of Memphis, which became a part of interstate commerce, which was sold to be transported in interstate commerce and used in the furtherance of interstate commerce, through its sales of goods to firms, agencies and industries engaged in interstate commerce and in the production of goods for interstate commerce (R. 60-62, 63, 66-67, 71, 77, 78, 87, 51, 54, 56-57, 138, 187, 188).

Nevertheless, the 2.2% interstate, or the 3.3% interstate, which is admitted absolutely by the respondent as representing interstate business conducted by its said store, is

sufficient to bring the said store within the purview of the Act.

*Lewis* v. *Nailling*, 3 Lab. Cas. 60078;
*U. S.* v. *Darby*, 3 L. C. 51, 108;
*Muldowney* v. *Seaberg*, 4 L. C. 60517.

*Features of said Store's Business.*

1.

The respondent's said store sold indiscriminately at wholesale and retail. It was out to get the business, The Trial Court, observed (R. 41):

> "And I suppose, although I am just supposing, that the purpose in having these retail stores is to more or less put Firestone Tires on the retail market in competition with the tires of others who are being sold at retail, so as to see that Firestone gets its share of the sale of tires, *regardless of how it is done, whether wholesale or retail.*"

The record shows that the said store was competing not only with others selling other brands of goods similar to that manufactured by respondent and sold by said store, but even underselling its own dealers, in selling goods in large quantities, at large discounts, in cases as much as a 45% discount, and at less than the price at which the dealers who bought from it could buy (R. 61, 63, 76, 91, 143). This is exactly the kind of competition that is aimed at by the Fair Labor Standards Act, as this competition entered into the interstate business of the said store.

2.

The wholesale and retail, the interstate and intrastate business of the said store was handled in unison and without segregation of any kind. Its stock was one commingled mass, from which was drawn the merchandise to fill the

orders and sales in the various types of business. The business was all under one roof, in one building, having no physical separation between its wholesale and retail business, its interstate and intrastate business; the service of its employees was utilized indiscriminately in and on its intrastate, interstate, retail and wholesale business. The business was conducted as an entity. *Wood* v. *Central Sand & Gravel,* 33 Fed. Sup. 40.

Petitioners worked on all phases of the respondent's said store's business each and every week (R. 52, 54, 62, 63, 68, 58, 92).

The rulings of the Administrator are not legally binding, but they are entitled to weight. *U. S.* v. *American Trucking Company.* Regarding the business of the said store, the Administrator in Section 41 of its Bull. #6 of June 1941, Revised, says:

> "An establishment may not be considered a *retail* establishment if a substantial portion of its selling is non-retail. In such cases the business, viewed as a *single establishment is not retail for the purpose of Section 213 (a) (2).* The exemption, however, may apply to the *retail portion* of the business *if adequately segregated* from the remainder."

In the case at bar, as in the case of *Wood* v. *Central Sand & Gravel* and *Lewis* v. *Nailling,* there was no separation between the retail and wholesale business of the said store.

3.

On the business such as conducted by the said store the Administrator has specifically spoken, in its Section 70 of Bull. #6 of June 1941:

> "Some tire and accessory dealers, however, *sell both at retail and non-retail.* Such establishments will not be considered retail establishments, if the *non-retail selling constitutes a substantial* portion of the total selling

> of the establishment. The non-retail sales include (1) sales to dealers, garages, mechanics, etc. for purpose of resale, (2) sales to business or industrial purchasers in quantities materially in excess of the quantities normally purchased by individual purchasers and at a special discount from the regular retail price, and (3) sales of the type of goods, such as heavy truck or bus tires, not purchased by the general consuming public."

The said store engaged in all three types of business set out in the foregoing section (R. 50, 54, 56, 57, 58, 60-63, 65-72, 76-81, 87, 91, 92, 94, 143, 146, 148 and Exhibits #1, 5 and 7, p. 150, 152, 153).

4.

Not only sales of goods were made to large consumers at great discounts from the regular retail price, but even "sales" of service to those organizations which utilized the services tendered by said store in servicing their trucks, trailers, tractors, automobiles, and in mounting and changing the tires thereon, were made at less than the retail price (R. 135, 148).

5.

Each item carried by said store was listed in salesbooks supplied to all its employees, except the Negroes working for said store; and said salesbooks listed three separate and distinct prices for each article handled by said store, to-wit, dealers, commercial and consumers. As stated by the Court, in *Fleming* v. *Stillman*, 6 Lab. Cas. 61566 (R. 62, 75, 87, 91).

> "* * * gentlemen, that is not the usual manner in which a retail business is conducted and that is their fixed policy in the sale of parts."

6.

Two separate types of billing statements were employed by said store, dealers and consumers, the commercial sales

being written up on the dealers' billing. And, those sales made at even less than dealers' prices were written up on the dealers' billing (R. 61, 74, 76, 77).

7.

Said store distributed catalogs containing a list and cuts of the multitude of products handled by it, and which carried the retail *and wholesale* prices on each of the articles 78, 91, 92).

8.

Excepting for the colored help, all employees of the said store were required to solicit orders and to sell merchandise handled by it. All the employees of said store were assigned monthly *quotas* which they were required to sell. The progress of each man's sales was shown *daily*, charts showing the total current sales to the date shown on the chart, together with data on the various types of business handled by said store, being posted in a regular place in said store. All the employees were required to attend the sales meetings, district meetings and conferences of the Southern District, all matters which were together with the quotas of sales assigned to the employees under the supervision of the District Sales Manager of the Firestone Tire & Rubber Company's Southern Division (R. 61, 63, 73, 75-76, 78, 84-85, 86, 95).

9.

Said store had in its employ three *commercial salesmen*, sometimes four. These salesmen did no work on the floor of the said store but solicited business from dealers and large consumers, interstate and intrastate (R. 61, 63, 68, 78, 91, 92.)

10.

Respondent's said store occupied one-fourth of a city block and employed about thirty persons, including six

regular, sometimes seven, colored employees. Of the six, sometimes seven, colored employees, only the petitioners were assigned and drove trucks during the time they were employed by respondent and attended to business away from the premises of said store (R. 52, 54, 58, 62, 63, 68, 92).

11.

Petitioners each worked twelve hours each day during every workweek they were employed by respondent and had no time off for lunch. In addition, each of the petitioners worked 12 hours every other Sunday (R. 32, 43-44, 49, 53, 54, 55, 62, 65, 86). Each of the petitioners was paid $50 per month by respondent (R. 29).

Petitioner Jillo Bynum was employed from October 24, 1938 to October 24, 1939, Lonnie Lewis from October 23, 1938 to April 30, 1939 and Robert Mullins from June 26, 1939 to September 22, 1940 (R. 28, 29).

OPINION OF THE COURT OF APPEALS.

The Opinion of the Court of Appeals is so devoid of facts as shown by the record and so confused on other facts as shown by the testimony in this cause, that it is not essential that we discuss same to any length (R. 191 et seq.). For instance, the Court refers to the said store being a "typical automobile service station" selling merchandise typically found in such a place. The question here is not the typical goods sold by the said store but the type of sales which it made of such goods. Had the said store sold its goods to all at a retail price then the business would have been exempt under Section 213 (a) (2). Again, the Court refers to "three customers" to whom the said store sold gasoline for resale. The number of dealers to whom the said store sold goods, and gasoline, for resale is not shown but Exhibit #7 reflects that over 25% of the transactions were *wholesale* (R. 106, 107, 153). The "three customers" to whom the

Court had reference were the three patrons shown on Exhibit #10, record 187, to whom gasoline up to and over 1500 gallons per 6-months period was sold, and at a discount. And, only one of these was considered by the respondent as a "dealer" and the other two as "consumer" sales because they used the gasoline in their business (R. 138, 188). Again, the Court practically ignores the substantial, and extensive business, engaged in by the said store in technical wholesale sales and sales made to consumers in wholesale transactions. All of which matters are shown on Exhibits #1 and #2 to the record, pages 150, 151. The court refers to *seven* employees of the said store. There were 30 employees of said store, *seven colored men* (R. 62, 64, 68, 92).

This Court is not bound by findings of the State Courts and will make its own findings from the evidence in the record.

**Conclusion.**

The Fair Labor Standards Act should be liberally construed. The exemptions contained in the provisions of the said Act must be strictly construed.

Under a correct interpretation of Section 213 (a) (2) and a strict construction being given to said section, the respondent's said store is not the *retail establishment* contemplated by this Section. The Court of Appeals of Tennessee and the Supreme Court of Tennessee erred in applying said section to respondent's store herein involved and granting exemption from the obligations contained in sections 206-207 of this federal statute. The Courts of Tennessee should be reversed in their holding on this issue and judgment entered in favor of the petitioners for the amounts and equities due them, shown in the appendix hereto.

With the utmost confidence *"that what Congress has given as bread this Court will not convert into stone"*,

(*Great Northern Ry.* v. *Local Great Falls Lodge*, 283 Fed. Rep. 557), we most respectfully submit to Your Honors clients' rights in the foregoing petition and brief.

WILLIAM M. HALL,
*Memphis, Tennessee,*
*Attorney for Petitioners.*

MARY GUIDI,
*Memphis, Tennessee,*
*Of Counsel.*

## APPENDIX.

Petitioners each worked 12 hours every weekday of each and every week during their respective employment periods and worked 12 hours on every alternate Sunday (R. 32). Petitioners were paid $50 per month (R. 29).

### Jillo Bynum.

(Employed from Oct. 24, 1938 to Oct. 24, 1939.)

| | |
|---|---|
| 26 weeks (84 hrs. wk.) is due $14.46 per week, or | $375.96 |
| 26 weeks (72 hrs. wk.) is due 9.96 per week, or | 258.96 |
| | 634.92 |
| Add liquidated damages | 634.92 |
| Total | 1269.84 |

### Lonnie Lewis.

(Employed from Oct. 23, 1938 to April 30, 1939)

| | |
|---|---|
| 14 weeks (84 hrs. wk.) is due $14.46 per week, or | $202.44 |
| 13 weeks (72 hrs. wk.) is due 9.96 per week, or | 129.48 |
| | 331.92 |
| Add liquidated damages | 331.92 |
| Total | 663.84 |

### Robert Mullins.

(Employed from June 26, 1939 to Sept. 22, 1940.)

| | |
|---|---|
| (From 6/26/39 to 10/24/39—17 weeks) | |
| 9 weeks (84 hrs. wk.) is due $14.46 per week, or | $130.41 |
| 8 weeks (72 hrs. wk.) is due 9.96 per week, or | 79.68 |
| (From 10/24/39 to 9/22/40—48 weeks) | |
| 24 weeks (84 hrs. wk.) is due $19.96 per week, or | 479.04 |
| 24 weeks (72 hrs. wk.) is due 14.56 per week, or | 349.44 |
| | 1038.57 |
| Add liquidated damages | 1038.57 |
| Total | 2077.14 |

Attorneys' Fees.

Add to judgments for petitioners:

1. Reasonable Attorneys' fee for preparation of cause and trial in Chancery Court of Shelby County, Tenn. .....
2. Reasonable Attorneys' fee for preparation of appeal, assignments of errors and brief, and representation in the Court of Appeals .....
3. Reasonable Attorneys' fee for preparing petition for writ of certiorari, assignments of errors and brief, and representation in Supreme Court .....
4. Reasonable Attorneys' fee for preparing petition for writ of certiorari and brief, and representation in the Supreme Court of the United States .....

Costs of Cause.

Petitioners allowed costs of this cause.

(13)

Office - Supreme Court, U. S.
FILED
OCT 26 1943
CHARLES ELMORE CROPLEY
CLERK

# In the Supreme Court of the United States

OCTOBER TERM, 1943.

## No. 356.

JILLO BYNUM, LONNIE LEWIS and ROBERT MULLINS,
*Petitioners,*

vs.

THE FIRESTONE TIRE & RUBBER COMPANY,
*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF TENNESSEE AND TO THE SUPREME COURT OF TENNESSEE.

## BRIEF FOR RESPONDENT.

EARL KING,
1407 First National Bank Bldg.,
Memphis, Tenn.,

LUTHER DAY,
1759 Union Commerce Bldg.,
Cleveland, Ohio,
*Attorneys for Respondent.*

*Of Counsel:*

THOMAS C. FARNSWORTH,
1407 First National Bank Bldg.,
Memphis, Tenn.,

THOMAS O. NEVISON,
C. C. WILLIAMS, JR.,
1759 Union Commerce Bldg.,
Cleveland, Ohio.

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—MAIN 5047

## INDEX.


Action of the Courts Below ..... 1

Jurisdiction ..... 3

Questions Presented ..... 3

Statutes Involved ..... 4

Regulation Involved ..... 5

Statement ..... 6

Summary of Argument ..... 9

Argument ..... 10

I. Petitioners Were Not Engaged in Interstate Commerce ..... 10

II. Petitioners Were Engaged in a Retail or Service Establishment the Greater Part of Whose Selling or Servicing Was in Intrastate Commerce ..... 14

1. The Respondent's Business has the Characteristics of a Retail Establishment ..... 14

2. The Respondent's Store and Service Station Qualifies as to the Sales Factors Involved in this Exemption ..... 16

3. The Administrator's Altered Administrative View Does Not Affect this Question ..... 17

4. The Intrastate Commerce Requirements of the Retail Establishment Exemption Have Been Fully Met ..... 17

III. Petitioners Were Employed in an Exempt Local Retailing Capacity ..... 18

Conclusion ..... 21

## TABLE OF AUTHORITIES.

### Cases.


*Allesandro v. C. F. Smith Company,* 136 F. (2d) 75 (C. C. A. 6th, 1943) ..... 13, 15

*Beard v. Beard,* 158 Tenn. 437; 14 S. W. (2d) 745 (1929) ..... 3

*Duncan v. Montgomery Ward,* 42 F. Supp. 879 (D. C. Texas, 1941) ..... 20

*Ellinger v. Goodyear Tire & Rubber Co.,* 40 F. Supp. 626 ..... 21

*Helvering v. Lerner Stores Corp.,* 314 U. S. 463 ..... 9

*Higgins v. Carr Bros. Co.,* 317 U. S. 572 ..... 12, 13

*Kirschbaum v. Walling,* 316 U. S. 517 ..... 10

*Langnes v. Green,* 282 U. S. 531 ..... 9

*Lingner v. Lingner,* 165 Tenn. 525; 56 S. W. (2d) 749 (1933) ..... 3

*Lonas v. National Linen Service Corp.,* 7 C. C. H. Labor Cases, par. 61661, C. C. A. 6th (1943) ..... 15

*Magee v. Early & Daniel Co.* (Prentice-Hall, Wage-Hour Service, Sec. 10737; Ky. Cir. Ct. 1942) ..... 20

*Martino v. Michigan Cleaning Co.,* C. C. H. Labor Cases, par. 61737, U. S. D. C., Michigan (1943) .. 15

*McLeod v. Threlkeld,* 63 S. Ct. 1248 ..... 10, 11, 12, 18

*Moses v. McKesson & Robbins,* 43 F. Supp. 528 ..... 21

*Petway v. Dobson,* 46 F. Supp. 114, modifying 43 F. Supp. 277 (D. C. Tenn. 1942) ..... 20

*Prescription House v. Anderson,* 42 Supp. 874 (D. C. Texas, 1941) ..... 20

*Remington v. Shaw* (Prentice Hall Wage and Hour Service, D. C. Michigan, 1942) ..... 15

*Super Cold Southwest Company v. McBride,* 124 F. (2d) 90 (C. C. A. 5th (1941)) ..... 11, 16

*Texarkana v. Arkansas Louisiana Gas Co.*, 306 U. S. 188 ..... 9

*Walling v. Goldblatt Bros. Inc.*, 128 F. 778, cert. den. 318 U. S. 757..... 13

*Walling v. Jacksonville Paper Co.*, 317 U. S. 564..... .....10, 11, 12, 13

*Walling v. Sanders, et al.*, 136 F. (2d) 78; C. C. A. 6th (1943) .....15, 16

*Walling v. L. Wieman Co.*, 7 C. C. H. Labor Cases, 61587 (1934) D. C. Wisc. ..... 21

*White Motor Company v. Littleton, et al.*, 134 F. (2d) 92 (C. C. A. 5th (1941))..... 11, 16

**Statutes.**

Administrative Regulations, Section 541.4..... 5, 18

Fair Labor Standards Act of 1938 (29 U. S. C. A., Sec. 201, *et seq.*)..... 1, 3

Section 2 (b) (29 U. S. C. A. 202 (b))..... 4

Section 3 (b) (29 U. S. C. A. 203 (b))..... 10

Section 6 (29 U. S. C. A. 206)..... 1, 4

Section 7 (29 U. S. C. A. 207)..... 1, 4

Section 13 (a) (1) (29 U. S. C. A. 213 (a) (1))..... .....2, 4, 5, 10

Section 13 (a) (2) (29 U. S. C. A. 213 (a) (2))..... .....1, 2, 3, 4, 5, 9, 10, 15

Section 16 (b) (29 U. S. C. A. 216 (b))..... 5

Judicial Code, Section 237, as amended by the Act of February 13, 1925, 43 Stat. 937 (28 U. S. C. A. Sec. 344 (b))..... 3

Public Acts of Tennessee of 1925, Ch. 100..... 3

# In the Supreme Court of the United States

**OCTOBER TERM, 1943.**

# No. 356.

JILLO BYNUM, LONNIE LEWIS and
ROBERT MULLINS,
*Petitioners,*

vs.

THE FIRESTONE TIRE & RUBBER COMPANY,
*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF TENNESSEE AND TO THE SUPREME COURT OF TENNESSEE.

## BRIEF FOR RESPONDENT.

### ACTION OF THE COURTS BELOW.

The suit was originally instituted by petitioners in the Chancery Court of Shelby County, Tennessee, to recover of respondent minimum wages, overtime compensation, liquidated damages and attorney's fees alleged to be due them under the provisions of the Fair Labor Standards Act of 1938 (29 U. S. C. A. Sec. 201, *et seq.*).

The trial court, upon the hearing of the cause, dismissed the suit upon the ground that the petitioners were employees of a retail and service establishment, the greater part of whose selling and servicing was in intrastate commerce within Section 13 (a) (2) of the Fair Labor Standards Act of 1938 (29 U. S. C. A. Sec. 213 (a) (2)), and that petitioners were, therefore, not covered by Sections 6 and 7 of the Act (29 U. S. C. A. Secs. 206, 207) (R. 35).

The petitioners perfected a limited appeal to the Court of Appeals of Tennessee, challenging the action of the trial court in so holding (R. 46, 47, *et seq.*).

Respondent also perfected an appeal to the Court of Appeals of Tennessee from so much of the decree of the trial court as further adjudged that the activities of petitioners in changing and mounting tires at respondent's store and service station in Memphis, Tennessee, upon trucks of interstate carriers of commerce constituted engaging in commerce within the purview of the Act; and appealed further from so much of the decree as failed to adjudge that the petitioners were employees employed in a bona fide local retailing capacity within Section 13 (a) (1) of the Act (29 U. S. C. A. Sec. 213 (a) (1)) (R. 47, *et seq.*).

Respondent filed in the Court of Appeals two assignments of error asserting that the petitioners were not thus engaged in interstate commerce, and that they were employees employed in a bona fide local retailing capacity within the meaning of the Act (R. 227).

The Court of Appeals of Tennessee affirmed the action of the trial court in dismissing the suit upon the ground that the establishment exemption provided in Section 13 (a) (2) of the Act was applicable, petitioners being therefore excluded from coverage under the Act (R. 191).

The Court of Appeals having thus determined adversely the petitioners' claim, upon the ground that the establishment exemption applied, it felt there was no necessity of considering respondent's assignments of error (R. 196).

Petitioners filed in the Supreme Court of Tennessee a petition for a writ of certiorari, challenging the action of the Court of Appeals in holding that the respondent's store and service station was an exempt retail establishment within Section 13 (a) (2) of the Act (R. 196).

Respondent also filed in the Supreme Court of Tennessee a petition for a writ of certiorari, again asserting

that the petitioners were not engaged in interstate commerce, in the production of goods for interstate commerce, or in any process or occupation necessary to the production of goods for interstate commerce within the Act (R. 233); and that petitioners were engaged in an exempt local retailing capacity.

The Supreme Court of Tennessee denied both petitions for certiorari, without opinion (R. 222).

The judgment and decree of the Court of Appeals was therefore final (Ch. 100 of the Public Acts of Tennessee of 1925).

Neither the Court of Appeals nor the Supreme Court of Tennessee has passed upon the question of the petitioners' non-engagement in interstate commerce, nor upon the issue as to whether they were employed in a bona fide local retailing capacity. Moreover, the denial of the petitions for certiorari by the Supreme Court of Tennessee should not be taken as affirming the reasoning of the trial court as to the defenses that the petitioners were not engaged in interstate commerce, or that the petitioners were employed in a local retailing capacity. (See *Lingner v. Lingner,* 165 Tenn. 525; 56 S. W. (2d) 749 (1933), criticizing and limiting *Beard v. Beard,* 158 Tenn. 437; 14 S. W. (2d) 745 (1929).)

## JURISDICTION.

The jurisdiction of this Court is invoked under Section 237 of the Judicial Code, as amended by the Act of February 13, 1925, 43 Stat. 937 (28 U. S. C. A. Sec. 344 (b).)

## QUESTIONS PRESENTED.

The petition for writ of certiorari indicates that the only question presented to this Court is whether the respondent's store and service station was a "retail establishment" under Section 13 (a) (2) of the Fair Labor Standards Act of 1938.

In fact, however, there have been involved from the beginning of the action, and there are now involved in this Court three distinct questions as follows:

1. Whether the petitioners as employees were engaged in interstate commerce within the meaning of the Fair Labor Standards Act, Sections 6 and 7 (29 U. S. C. A. Secs. 206-207).

2. Whether the petitioners, if so engaged in interstate commerce, were exempt because engaged in a retail or service establishment, a greater part of whose selling or servicing was in intrastate commerce, Section 13 (a) (2) (29 U. S. C. A. 213 (a) (2).)

3. Whether petitioners, if engaged in interstate commerce and if engaged in an establishment covered by the Fair Labor Standards Act, were exempt under the provisions of Section 13 (a) (1) of the Act (29 U. S. C. A. 213 (a) (1)), as employees engaged in "a bona fide * * * local retailing capacity * * * (as such terms are defined and delimited by the Administrator)."

## STATUTES INVOLVED.

29 U. S. C. A. Sections 206 and 207 provide in part:

> "Every employer shall pay to each of his employees who is engaged in commerce or in the production of goods for commerce wages at the following rates * * *"
>
> "No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce * * *"

thereafter fixing the maximum hours of work beyond which premium payments are required.

29 U. S. C. A. Section 202 (b) provides:

> " 'Commerce' means trade, commerce, transportation, transmission, or communication among the sev-

eral States or from any State to any place outside thereof."

29 U. S. C. A. Section 213 (a) (2) also provides in part:

"The provisions of Sections 206 and 207 shall not apply with respect to * * * (2) any employee engaged in any retail or service establishment the greater part of whose selling or servicing is in intrastate commerce;"

29 U. S. C. A. Section 213 (a) (1) is in part:

"The provisions of Sections 206 and 207 shall not apply with respect to (1) any employee in a bona fide * * * local retailing capacity * * * (as such terms are defined and delimited by regulations of the Administrator);"

29 U. S. C. A. Section 216 (b) provides in part as follows:

"Any employer who violates the provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages * * *. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action."

## REGULATION INVOLVED.

The only official Administrative Regulation in this case, having the force and effect of law and promulgated pursuant to the express direction of the Act, is the following:

"Section 541.4. *Local Retailing Capacity*—The term 'employees employed in a bona fide local retailing capacity' in Section 13 (a) (1) of the Act shall mean any employee,—

(A) who customarily and regularly is engaged in,—

(1) making retail sales the greater part of which are in intrastate commerce; or

(2) performing work immediately incidental thereto, such as the wrapping or delivery of packages, and

(B) whose hours of work of the same nature as that performed by non-exempt employees do not exceed 20% of the number of hours worked in the work-week by such non-exempt employees."

## STATEMENT.

Petitioners are three former employees of Firestone Auto Supply and Service Store.

The Firestone store and service station, located at Washington Avenue and Third Street, Memphis, Tennessee, was and is a separate unincorporated establishment owned and operated by respondent. The store and service station is a wholly distinct business unit, physically apart, with its own books and bank account, and with supervisory control of its own employees (R. 93, 95, 96). Respondent also owns a Tennessee subsidiary, The Firestone Tire & Rubber Company of Tennessee, which is not a party to the present litigation. The store and service station buys merchandise and supplies from The Firestone Tire & Rubber Company of Tennessee and from independent sources (R. 95).

The store and service station maintained a stock (R. 91) of tires, tubes, bicycles, batteries, hardware, electrical accessories, radios and other commodities (R. 65, 91, 93) which were sold to its customers. Some of these products were manufactured by respondent—others by independent manufacturers (R. 95). The store and service station employees (except service station employees such as petitioners), as well as three or four outside salesmen, were furnished with sales books in which sales of the various

items carried were entered. Gasoline and oil were served from service pumps. No manufacturing, processing, or retreading of tires was carried on at the store and service station (R. 92). Some of the merchandise sold, particularly tires, was also serviced by the store and service station employees (R. 92). Some merchandise, gasoline and tires, was sold at a discount to purchasers in large volume, whether such purchasers were persons, companies, or dealers (R. 91). The greater part of the store and service station's business, however, was in sales to individuals (R. 91-96). The petition in this Court alleges (p. 11), and petitioners assert in their brief (p. 28), "25.2% of the number of transactions handled by said store are of a wholesale character" (R. 46). The basis of this allegation and assertion is said to be Defendant's Exhibit 7 (R. 153). The allegation and assertion are inaccurate, since Exhibit 7 refers only to "Transactions Other than Cash" (R. 107, 153)—that is, "charge" transactions (R. 107)—and has no reference to total transactions handled by the store and service station.

A detailed analysis of the dollar volume of the selling and servicing activities of the store and service station during the periods of petitioners' employment was prepared by Witness J. H. Laumer, Auditor for the store and service station. This analysis reveals that during the period of petitioners' employment 75.2 per cent to 84 per cent of the total sales made by the store and service station were sales for customer consumption and not for resale (R. 151, Dft's Ex. 2); that is,—in accordance with common understanding and sales language,—such sales were "retail" sales (R. 151). Additional analyses were prepared by this same witness to conform to the rulings of the Administrator of the Wage and Hour Division with respect to retail sales. The audit in that regard reveals that from October 24, 1938 (the effective date of the Fair Labor Standards Act), until September 30, 1940 (a date

subsequent to all employment periods in controversy), from 60.9 per cent to 71.3 per cent of the total sales made by the store and service station were retail sales within the purview of the Administrator's rulings (R. 100; Ex. 1, 150; 102; 114). From October 24, 1938 to September 20, 1940 (a date after which none of the petitioners was employed by respondent), less than four per cent of all the selling and servicing of the store and service station was for customers whose places of business were in another state. 96.7 per cent of all the selling and servicing during that period was unquestionably intrastate in character (R. 111; 117; Dft's Ex. 5, 152). All these dollar-volume analyses represented only one of the criteria in determining the retail nature and characteristics of respondent's business.

These employees were service-station help, whose jobs involved routine tasks about the place with infrequent errands of one sort or another. The record contains no definite statement as to the precise allocation of their working hours. There is in the record no clear evidence as to the extent to which petitioners participated in any interstate activity of respondent's establishment. The burden of proof was on petitioners to establish that participation in interstate commerce.

The work performed by the petitioners was principally in the servicing of automobiles, particularly changing and mounting tires. Most of their work was done on the premises of the store and service station (R. 94). In addition, petitioners made a few incidental deliveries and pickups of tires for repair, and also made service calls in the City of Memphis. For example, Petitioner Bynum made nine pickups in September, 1939 (R. 113, 141), and Petitioner Mullins made one pickup in September, 1939 (R. 113, 141). The time spent by petitioners in delivering tires and merchandise would average about two hours a day (R. 94, 95). Occasionally, a service delivery (which might include the mounting of a tire) was made just across the river in

Arkansas by an employee other than these petitioners (R. 90-96).

By appropriate proceedings in the trial court, in the Court of Appeals of Tennessee and in the Supreme Court of Tennessee, respondent contended that recovery should be denied petitioners on two grounds in addition to the exemption of Section 13 (a) (2) of the Act (R. 5, 22, 222, 227, 233). *First*, they were not engaged in commerce or in the production of goods for commerce. *Second*, they were employed in a bona fide local retailing capacity within Section 13 (a) (1) of the Act.

The appellate courts below either rejected or pretermitted such issues made by the respondent. The respondent in this Court, without filing a cross-petition, may therefore urge grounds rejected by the courts below in support of a judgment under review. *Helvering v. Lerner Stores Corp.*, 314 U. S. 463; *Langnes v. Green*, 282 U. S. 531, 539; *Texarkana v. Arkansas Louisiana Gas Co.*, 306 U. S. 188.

## SUMMARY OF ARGUMENT.

It is the position of the respondent that no one of the petitioners, while working for respondent at its store and service station, was engaged in interstate commerce. (It is conceded by petitioners that none of them was actually engaged in the production of goods for commerce.) Respondent thus contends that the provisions of the Fair Labor Standards Act of 1938 do not therefore apply to or cover the petitioners' employment with respondent. Petitioners have wholly failed to satisfy the burden of proof in this regard.

Respondent further contends that (if it should be found that the petitioners were while in respondent's employment engaged in interstate commerce), in any event such employment was in a retail or service establishment, the greater part of whose selling or servicing was in intrastate commerce; and that their employment was therefore

specifically exempted from the Wage and Hour provisions of the Fair Labor Standards Act by Section 13 (a) (2) of such Act.

Respondent further contends, finally, that the petitioners themselves were engaged in a bona fide retailing capacity; and that their employment was therefore specifically exempted from the Wage and Hour provisions of the Fair Labor Standards Act by Section 13 (a) (1) of that Act.

## ARGUMENT.

### I. PETITIONERS WERE NOT ENGAGED IN INTERSTATE COMMERCE.

The provisions of the Fair Labor Standards Act of 1938 apply only to employees engaged in interstate commerce or in the production of goods for interstate commerce (29 U. S. C. A. 203 (b)). *Kirschbaum v. Walling*, 316 U. S. 517; *Walling v. Jacksonville Paper Co.*, 317 U. S. 564; *McLeod v. Threlkeld*, 63 S. Ct. 1248.

The petitioners admit that they were not engaged in the production of goods for interstate commerce (see petition in this Court, page 6). Also, note petitioners' brief at page 39:

> "This action is not predicated upon any premise that the unit store herein was engaged in the manufacturing or production of goods, but based upon the fact that said store was engaged in selling, and at wholesale and retail, in interstate commerce and intrastate commerce."

Therefore, it is necessary in this case to determine only whether petitioners were "engaged in interstate commerce."

In making such determination "it is the work of the employee which is decisive," *McLeod v. Threlkeld, supra*, p. 1252; the burden is upon the employees (petitioners) to show what part of their work was in interstate commerce

as distinguished from that in intrastate commerce, *White Motor Company v. Littleton, et al.*, 134 F. (2d) 92 (C. C. A. 5th (1941)); *Super Cold Southwest Company v. McBride*, 124 F. (2d) 90 (C. C. A. 5th (1941)).

Under the Fair Labor Standards Act the employee, to become entitled to the benefits of the Act, must be actually in or so closely related to the movement of interstate commerce as to be a part of it. It is not sufficient that an employee's "activities affect or indirectly relate to such interstate commerce." As stated by this Court in *McLeod v. Threlkeld, supra*, at page 1251:

> "The test under this present act, to determine whether an employee is engaged in commerce, is not whether the employee's activities affect or indirectly relate to interstate commerce but whether they are actually in or so closely related to the movement of the commerce as to be a part of it."

And, there must be a substantial part of the employee's work which is in or closely related to interstate commerce, in order to bring him within the provisions of the Act (*Walling v. Jacksonville Paper Co., supra*, p. 572).

In determining the nature of petitioners' employment, it is necessary therefore to examine the character of their place of employment (respondent's store and service station) and also the nature of the business transacted by that store and service station.

The record discloses that the store and service station handled a variety of products, including such articles as radios, batteries, electrical accessories, and tires and tubes. The store and service station also sold gasoline (R. 65, 91, 93).

The record shows that at most, only 3.3 per cent of the sales and service volume of this store and service station was in interstate commerce, or more accurately—to customers with out-of-state addresses. But the record fails to show—and in this respect petitioners utterly failed

to sustain their burden of proof—to what extent, if any, petitioners participated in this limited amount of so-called interstate business of the establishment.

Although originally some effort was made by petitioners to show that some of the pickups and tire service work was done by petitioners in Arkansas, the trial court found (the Court of Appeals concurring) that petitioners' testimony in this regard was highly colored and exaggerated (R. 32, 38, 39, 195). Additionally, the record (R. 50, 56, 89, 90) shows that actually any delivery or tire service in Arkansas was made and done by one Thurston Starks. The trial court found that the petitioners had not established what part of their employment was spent in changing and mounting tires on vehicles which might be moving in interstate commerce, whether such work was done at respondent's store and service station or elsewhere (R. 32-38). It is clear therefore that petitioners have failed to establish that a substantial part of their work was in interstate commerce. (*Walling v. Jacksonville Paper Co., supra*; *Higgins v. Carr Bros. Co.*, 317 U. S. 572.)

Changing and mounting tires of an interstate vehicle at the Memphis store and service station or anywhere else in the State of Tennessee would in no event constitute an engagement by the petitioners in interstate commerce. Such work is not so closely related to interstate commerce as to be a part of it. *Walling v. Jacksonville Paper Co., supra; McLeod v. Threlkeld, supra.*

The only other claim made by petitioners for an engagement in interstate commerce is based upon occasional pickups of merchandise which were made by them at the Firestone Plant in Memphis. The merchandise so picked up was delivered by petitioners to the store and service station. Petitioners claim, since some of this merchandise was manufactured outside the State of Tennessee, it must follow that their work in picking up was in interstate commerce. The record is clear that such

pickups were wholly unconnected with any unbroken stream of commerce from the plant of The Firestone Tire & Rubber Company to any ultimate consumer. There was no practical continuity of movement from the manufacturer or supplier without the state through the plant and on to customers whose price orders, contracts or understanding were being filled. The merchandise so handled by petitioners had definitely come to rest at the Firestone Plant in Tennessee. *Walling v. Jacksonville Paper Co., supra*; *Higgins v. Carr Bros. Co., supra*; *Walling v. Goldblatt Bros. Inc.,* 128 F. 778, cert. den. 318 U. S. 757.

In the *Goldblatt* case, it was held that employees handling goods up to the time the goods arrived at the unloading platform of a wholesale warehouse were engaged in interstate commerce, but that thereafter such employees were not engaged in interstate commerce within the provisions of the Fair Labor Standards Act. This Court denied certiorari in the *Goldblatt* case, February 1, 1943, after the decision of *Walling v. Jacksonville Paper Co., supra,* and it would therefore seem that the ruling limiting the coverage of the Act up to the time goods arrive at the unloading platform has been approved by this Court. (See also, *Allesandro v. C. F. Smith Company,* 136 F. (2d) 75 (C. C. A. 6th, 1943).)

Furthermore, the record discloses that such pickups constituted a very small part of the work done by petitioners (R. 113, 141).

It appears therefore that the record discloses no basis upon which it can be said that these petitioners were engaged in interstate commerce within the meaning of the provisions of the Fair Labor Standards Act and the decisions of this Court. The courts below should have denied petitioners any recovery upon this ground; and while the suit was dismissed for reasons discussed under Point II of the Argument of this brief, it is nevertheless apparent that the actions of the courts below in dismissing the suit

were proper for the additional reason that petitioners failed to prove an engagement in interstate commerce.

## II. PETITIONERS WERE ENGAGED IN A RETAIL OR SERVICE ESTABLISHMENT THE GREATER PART OF WHOSE SELLING OR SERVICING WAS IN INTRASTATE COMMERCE.

### 1. The Respondent's Business has the Characteristics of a Retail Establishment.

Respondent's store and service station was operated as a distinct unit or establishment, physically and administratively separate and apart from other activities of respondent. The store and service station maintained its own bank account, kept its own books and accounts and supervised and paid its own employees (R. 93, 95-96).

The merchandise and supplies bought by the store and service station from The Firestone Tire & Rubber Company of Tennessee (a separate corporation and not a party in this cause), from independent suppliers and other sources were billed to and paid by the store and service station in the same manner as an independent dealer (R. 93, 95-96).

Petitioners concede that the store and service station is to be considered as a unit, wholly unrelated to respondent's other activities (Petition p. 6).

Congress did not lay down criteria for determining what is or is not a retail establishment. It must be presumed that Congress used the words "retail establishment" in the ordinary business or common understanding of the term.

Sales factors are only one of the elements to be considered. A realistic consideration of the nature of the store and service station, the location in a retail neighborhood, the typical automobile-owner customer, the miscellaneous stock of goods (ranging from gasoline, automobile tires and accessories to children's toys) for indi-

vidual consumption, and the selling and furnishing generally of merchandise and service to the consuming public demonstrate the retail characteristics of this store and service station (R. 38, 65, 137).

The business of respondent's store and service station is a retail business, its goods are those ordinarily acquired by a local merchant primarily for local disposition. Its activities differ not at all from those of the corner store with service facilities, except in volume. Cf. *Allesandro v. C. F. Smith Co., supra*; *Walling v. Sanders, et al.*, 136 F. (2d) 78; C. C. A. 6th (1943).

Incidental service does not affect the character of the establishment. A retail establishment may not only sell merchandise but it may also perform services necessary to the use of such goods. Thus, in connection with its retail selling it may also render the usual servicing furnished by an establishment of a similar character. For example, the neighborhood grocery offers delivery service to its customers, and the radio dealer puts up aerials for his customers. These examples merely illustrate the general proposition as to the incidental service; and the decision in *Remington v. Shaw* (Prentice Hall Wage and Hour Service, D. C. Michigan, 1942), supports this position.

Here, by way of illustration, the service of changing and mounting tires upon the automobiles of the customers of the store and service station is a necessary adjunct to its business.

Section 13 (a) (2) of the Fair Labor Standards Act exempts either a retail or a service establishment. *Lonas v. National Linen Service Corp.*, 7 C. C. H. Labor Cases, par. 61661, C. C. A. 6th (1943); *Martino v. Michigan Cleaning Co.*, C. C. H. Labor Cases, par. 61737, U. S. D. C. Michigan (1943).

Obviously, a retail establishment rendering predominantly local and retail service incidental to its selling business is within the exemption.

**2. The Respondent's Store and Service Station Qualifies as to the Sales Factors Involved in this Exemption.**

The word "retail" is not defined in the Fair Labor Standards Act. Within the common, every-day business understanding in sales parlance, a retail sale means one made for consumption or use by the purchaser. Similarly, a retail business is one whose function is to sell goods or services for use and not for resale. *White Motor Company v. Littleton, supra*; *Super Cold Southwest Co. v. McBride, supra*; *Walling v. Sanders, supra.* In the absence of legislative directive it can be presumed that Congress used the term retail in this sense.

An analysis was therefore made (Ex. 2, R. 151) within the concept that a sale for consumption and not for resale, irrespective of the price and quantity involved, constitutes a retail sale.

From such analysis it appears that for the period from October 24, 1938, the effective date of the Act, up to December 31, 1940, subsequent to all employment periods in controversy, 75.2 per cent to 84 per cent of the total sales made by this store and service station were sales for consumption and not for resale—in common business parlance, retail sales.

For the same period, within the restricted interpretative rulings of the Administrator to the effect that quantity, price and use are factors which determine whether a sale is "retail" (Interpretative Bulletin No. 6) (Ex. 9, R. 160), 60.9 per cent to 71.3 per cent of the total sales made and service furnished by the store and service station were retail sales. Therefore, within either concept, more than 50 per cent of the store and service station's selling was retail sales.

### 3. The Administrator's Altered Administrative View Does Not Affect this Question.

Originally, the Administrator's Interpretation of April, 1940, provided that a store might be considered a retail establishment if more than 50 per cent of the dollar value of its total sales were retail sales. But establishments which sold at retail and non-retail could not be considered retail, if more than 50 per cent (dollar value) of the sales were in fact non-retail. Later, in June, 1941, the Administrator issued his Revised Interpretative Bulletin No. 6, by the terms of which the amount of non-retail sales or servicing was reduced to 25 per cent, as an administrative ruling. It should be noted that this revision of policy was effected several months after termination of all employment periods in controversy in the present litigation. To put it another way—while the petitioners were employed by the respondent, the rule was 50 per cent; once the employees had relinquished their jobs, the new official attitude was that the non-retail activities should not exceed 25 per cent. No unfair retroactive alteration of the prior interpretation of the law should be binding on these facts.

Petitioners worked for respondent while the 50 per cent ruling was in effect, and the legal incidents of their employment cannot be retroactively modified, long after they have left their jobs.

### 4. The Intrastate Commerce Requirements of the Retail Establishment Exemption Have Been Fully Met.

96.7 per cent of all the selling and servicing activities of respondent's store and service station was in intrastate commerce (Ex. 5, R. 152).

Respecting the interstate activity of respondent, it can be said that the interstate sales reflected in the record resulted primarily, if not wholly, from the fact that respondent's store and service station is located in Memphis, Tennessee, near the state lines of Arkansas and Mississippi.

What has been said by this Court in *Walling v. Jacksonville Paper Co., supra,* is therefore particularly applicable to the limited interstate activity of respondent:

> "It is quite clear that the exemption in Section 13 (a) (2) was added to eliminate those retailers located near the state lines and making some interstate sales." (p. 571.)

The business of the store and service station, as well as the duties of petitioners, present a definite local matter only. For this reason we are reminded that:

> "* * * Congress, in enacting this statute, plainly indicated its purpose to leave local business to the jurisdiction of the states." (*Walling v. Jacksonville Paper Co., supra,* 570.)

## III. PETITIONERS WERE EMPLOYED IN AN EXEMPT LOCAL RETAILING CAPACITY.

The provisions of the Fair Labor Standards Act do not apply with respect to any employee "employed in a bona fide local retailing capacity (as such terms are defined and delimited by regulations of the Administrator)," regardless of the retail or non-retail character of the establishment. The official Administrative definition is as follows:

> "Section 541.4 *Local Retailing Capacity*—The term 'employees employed in a bona fide local retailing capacity' in Section 13 (a) (1) of the Act shall mean any employee,—
>
> (A) who customarily and regularly is engaged in,—
>
> (1) making retail sales the greater part of which are in intrastate commerce; or
>
> (2) performing work immediately incidental thereto, such as the wrapping or delivery of packages, and
>
> (B) whose hours of work of the same nature as that performed by non-exempt employees do not exceed 20% of the number of hours worked in the work-week by such non-exempt employees."

The trial court expressly found that the major part of the employment time of petitioners, as employees of respondent's store and service station, was spent in a bona fide local retailing capacity (R. 32, 45). The Court of Appeals of Tennessee, in effect, also so found (R. 193). The trial court declined to hold specifically that the petitioners were thus employed within Section 13 (a) (1) of the Act, as defined and delimited by the Administrator, although the evidence amply complied with the whole of the Administrator's regulation in this regard. The Court of Appeals of Tennessee did not consider respondent's assignment of error in that court challenging this action of the trial court, deeming further consideration of this issue unnecessary in view of the affirmance of dismissal (R. 222).

The evidence relating to petitioners' hours of work and activities may briefly be summarized. Their work-day approximated twelve hours, with every other Sunday off; and the trial court and the Court of Appeals so found (R. 32, 193). Their duties were those usually performed by automobile service-station attendants,—such as changing and mounting tires, making customer-service calls, and incidental deliveries of tires sold by the store and service station (R. 38, 44, 45, 193). The testimony of each petitioner (in narrative form in the record before this Court as prepared by their counsel), reflects no evidence of any duties performed outside the state by petitioners.

The record fails to show that petitioners' duties were related to any interstate activity of respondent's store and service station, which was barely 3.3 per cent of its over-all business. At most, about two hours of the twelve-hour day were spent by each petitioner in servicing trucks of commercial concerns and for dealer accounts, which were alleged to be non-retail activities within certain interpretative views of the Administrator. No relation to channels of commerce is shown. Therefore, even within the strict administrative views of the Administrator, more than 80

per cent of petitioners' respective employment-hours were spent in a local retailing capacity.

The Administrator's Regulation requires that the local retailing employees be regularly engaged in making retail sales predominantly intrastate or they must be regularly engaged in work incidental thereto approximately 80 per cent of the time. The evidence shows these regulatory tests have been met and thus the individual exemption applies.

In *Petway v. Dobson,* 46 F. Supp. 114, modifying 43 F. Supp. 277 (D. C. Tenn. 1942), a clerk who was mainly engaged in making retail sales in intrastate commerce was held exempt as being employed in a bona fide retail capacity, even though he was actually employed in a wholesale warehouse not within the "retail-establishment" exemption. According to the court in that case, the portion of the claimant's time spent in sweeping out the office where interstate business was done, and in unloading cars, was considered too negligible to affect his status. Similarly, *The Prescription House v. Anderson,* 42 F. Supp. 874 (D. C. Texas, 1941), decided that employees of a retail drug store were exempt, despite the fact the store was also used for manufacturing a remedy that was sold to a limited extent in interstate commerce. Another such case is *Magee v. Early & Daniel Co.* (Prentice-Hall, Wage-Hour Service, Sec. 10737; Ky. Cir. Ct. 1942), where an employee worked in a separate branch store the sales of which were wholly in intrastate commerce and practically all at retail. The court exempted the employer from the Act, remarking that it was immaterial to what extent the latter might be engaged in interstate commerce—and immaterial also whether the employee actually did a part of his work in such interstate commerce. A final illustration of the lower-court trend is indicated by *Duncan v. Montgomery Ward,* 42 F. Supp. 879 (D. C. Texas, 1941), holding that employees working in a retail warehouse maintained by the employer to supply his retail store in that city were employed in a

"local retailing capacity." (See also, *Moses v. McKesson & Robbins,* 43 F. Supp. 528; *Ellinger v. Goodyear Tire & Rubber Co.,* 40 F. Supp. 626; and *Walling v. L. Wieman Co.,* 7 C. C. H. Labor Cases, 61587 (1943) D. C. Wisc.)

It is therefore contended that the petitioners should be regarded as having been employed in a local retailing capacity. The Administrator has practically conceded this in Field Bulletin, Vol. II, No. 2 (1941), to the effect that mechanics and service men who wash, grease, or otherwise service cars are now considered to be performing work immediately incidental to the retail sale of such cars. For these reasons, the defense of respondent that petitioners ought properly to be regarded as local-retailing-employees is sustained by the record.

## CONCLUSION.

We respectfully submit that, upon the law and the evidence, and for the reasons hereinbefore set forth, the petition for writ of certiorari should be denied.

Respectfully submitted,

EARL KING,
1407 First National Bank Bldg.,
Memphis, Tenn.,

LUTHER DAY,
1759 Union Commerce Bldg.,
Cleveland, Ohio,
*Attorneys for Respondent.*

*Of Counsel*:

THOMAS C. FARNSWORTH,
1407 First National Bank Bldg.,
Memphis, Tenn.,

THOMAS O. NEVISON,

C. C. WILLIAMS, JR.,
1759 Union Commerce Bldg.,
Cleveland, Ohio.